(16,821.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 259.

JAMES M. SIGAFUS, PLAINTIFF IN ERROR,

vs.

DUDLEY PORTER ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 29, 1898.

1 United States Circuit Court of Appeals, Second Circuit.

Present: The Honorable E. Henry Lacombe, the Honorable Nathaniel Shipman, circuit judges.

JAMES M. SIGAFUS, Plaintiff in Error,
vs.
DUDLEY PORTER ET AL., Defendants in Error.

Certification of Questions to the Supreme Court under the Act of March 3, 1891.

This cause came before this court on November 11, 1897, upon a writ of error sued out by the defendant below to review a judgment of the U. S. circuit court, southern district of New York, in favor of the plaintiff below, defendant in error. The record is voluminous, covering some 400 printed pages of testimony and nearly 100 pages of exhibits. There are thirty-two assignments of error, all but two of which have been supported by argument in this court. As to all of these thus argued, except two, this court has reached a conclusion; but as to the questions of law arising upon those two, it desires the instruction of the Supreme Court for its proper decision.

2 *Statement of Facts.*

The action is one to recover damages for deceit by defendant inducing the purchase of a gold mine (real estate, improvements, plant, and mining rights) by the plaintiffs. There was evidence tending to show and the jury found that by false representations and fraudulent devices defendant misled plaintiffs as to the history, condition, and value of the mine; that defendant knew the falsity of such representations; that they were material; that plaintiffs relied upon them in good faith and were induced thereby to make the purchase, which they would not have made except for such false representations and fraudulent devices. There was conflicting evidence, but sufficient proof to enable the jury to determine as to what would have been the value of the mine had it been such as defendant represented it to be. There was conflicting evidence, but sufficient proof to enable the jury to determine as to what was in fact the value of the mine on the day the purchase was consummated and the property transferred. There was no conflict of evidence as to what was paid for the mine nor as to what was laid out upon it by plaintiffs after purchase in order to develope it.

Question Certified.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision is—

"What is the proper measure of damages to be applied in
3 assessing plaintiffs' recovery? Is it—

A. The difference between the value of the property as it proved to be and as it would have been as represented; or—

B. The money plaintiffs had paid out for the mine, with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it?"

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing question of law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

E. HENRY LACOMBE,
Circuit Judge.
N. SHIPMAN, *Circuit Judge.*

4 UNITED STATES OF AMERICA, *Second Circuit,* } *ss.*:

I, William Parkin, clerk of the United States circuit court o appeals for the second circuit—

Do hereby certify that the foregoing certificate in the case entitled James M. Sigafus, plaintiff in error, *versus* Dudley Porter *et al.*, defendants in error, was duly filed and entered of record in my office by order of said court on the 7th day of January, 1898, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 7th day of July, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

5 [Endorsed:] United States circuit court of appeals, second circuit. James M. Sigafus, pl'ff in error, *vs.* Dudley Porter *et al.*, def'ts in error. Certificate of questions to Supreme Court.

Endorsed on cover: Case No. 16,821. United States circuit court of appeals, second circuit. Term No., 259. James M. Sigafus, plaintiff in error, *vs.* Dudley Porter *et al.* (Certificate.) Filed March 14, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 8

JAMES M. SIGAFUS, PLAINTIFF IN ERROR,

vs.

DUDLEY PORTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CERTIORARI AND RETURN FILED JUNE 16, 1899.

(16,821.)

(16,821.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 48.

JAMES M. SIGAFUS, PLAINTIFF IN ERROR,

vs.

DUDLEY PORTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Judges of the Circuit Court of the United States for the Southern District of New York:

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Dudley Porter, John L. Hobson and Charles W. Morse, plaintiffs, and James M. Sigafus, defendant, a manifest error hath happened, to the great damage of the said James M. Sigafus, as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 3d day of February, 1897, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

2

3

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of January, in the year of our Lord one thousand eight hun-

dred and ninety-seven and of the Independence of the United States the one hundred and twenty-first.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

[L. S.]

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York.* } ss.:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to 558 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of James M. Sigafus, plaintiff in error, against Dudley Porter, John L. Hobson and Charles W. Morse, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of January, in the year of our Lord, one thousand eight hundred and ninety-seven and of the Independence of the United States the one hundred and twenty-first.

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT, 7

SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and Charles W. Morse,

against

JAMES M. SIGAFUS.

To the above-named Defendant: 8

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the City of New York, this fourth day of April, in the year one thousand eight hundred and ninety-five. 9

[L. S.] JOHN A. SHIELDS,
Clerk.

STICKNEY, SPENCER & ORDWAY,
Plaintiffs' Attorneys,
Office and Post-office Address,
31 Nassau Street,
New York City.

10 CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and CHARLES W. MORSE,

Plaintiffs,

against

JAMES M. SIGAFUS,

11 *Defendant.*

The plaintiffs above named, Dudley Porter, John L. Hobson and Charles W. Morse, by Stickney, Spencer & Ordway, their attorneys, complain of the defendant above named, James M. Sigafus, and allege, upon information and belief, as follows:

I.—At all of the times herein mentioned the plaintiffs above named were, and they are now, each and all of them, citizens and inhabitants of the Commonwealth of Massachusetts, and residents
12 of the City of Haverhill, in said Commonwealth of Massachusetts.

II.—The defendant above named was and is a citizen and inhabitant of the State of New York, and of the Southern District of said State of New York, and a resident of the City of New York, in said State of New York.

III.—For some time prior to and down to, on or about the 28th day of December, 1893, the legal title to certain lands and mines and mining claims situated in the Pinacate Mining District, in the County of Riverside, in the State of California, and known as the Good Hope Consolidated Gold Lode

Mining Claim, consisting of the San Jacinto and Good Hope Quartz locations, and as the "Annex," adjoining the Good Hope mine on the south, together with all the dips, spurs and angles; and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein; and also the mill and buildings thereupon, and certain personal property, consisting of mining tools, implements, &c., used in connection with said mines, upon said premises, was in the name of the Good Hope Consolidated Gold Mining Company, a corporation organized under the laws of the State of California. The defendant, James M. Sigafus, was the president of said corporation and owned the entire capital stock of said corporation with the exception of a few shares which were in the name of his son-in-law, J. Everett Bird, and was, in fact, the sole beneficial owner of said lands and mines and mining claims and the appurtenances thereto and the property thereupon.

IV.—During said period, and previous to the 28th day of December, 1893, the defendant, representing his own interests and those of said Good Hope Consolidated Gold Mining Company and of said Bird, through one William H. Griffith, entered into negotiations with the plaintiffs for a sale to them of said lands and mines and mining claims and the appurtenances thereto and the property thereupon.

V.—During said period and previous to the 28th day of December, 1893, the plaintiffs herein entered into negotiations for the purchase of said lands and mines and mining claims and the appurtenances thereto and the property thereupon; and thereupon, and in the course of said negotiations, the defendant falsely and fraudulently, and with the intent thereby to deceive and defraud the plaintiffs, represented to them, knowing said representations to be false and fraudulent, that said lands and mines

16 and mining claims contained a large and valuable vein of gold-bearing ore and large and valuable deposits of gold, and that all of the gold-bearing quartz in said lands and mines and mining claims would average in milling more than $16 per ton, and laid before the plaintiffs a false and fraudulent report or statement in writing in regard to said lands and mines and mining claims, made by one Burnham, who was therein represented to be an independent and disinterested mining engineer and expert, and to have made a careful and complete examination of the premises, which report or statement, in substance, stated that the pay streak in
17 said mines had an average width of two feet; that 2,434 tons of ore from said mine had been milled, and yielded an average value in gold of $23.78 per ton; that said mines had been operated, and the ore taken therefrom had been milled for a considerable length of time, to wit, for two years or more, and that the ore produced had yielded, in gold, an average of $23.78 per ton; that the value of the bullion produced from said mine, for the twelve months ending with January, 1892, inclusive, was $57,879.78, and that the total expense of said production was $15,500; that the estimated total bullion product from said mine, since its discovery down to on or about February 1st, 1892, was
18 $317,879.78; that, beyond all doubt, the ore in said mines averaged to carry at least $18 per ton in gold; that said mines contained 44,733 tons of gold ore in reserve, of the net value of $805,186, and also contained 37,333 tons of gold ore in sight, of the net value of $761,094, and that said mines and mining claims had a very large prospective value in addition thereto; that the gold-bearing vein in said mines was a permanent and lasting one, and that said property, under energetic management, should produce from $30,000 to $40,000 per month net, and keep the development even with the output, together with other statements of fact in regard to said lands and mines and mining property,

each and all of which statements were false and 19
fraudulent, representing said report to be just and accurate and true, although knowing the same to be false and fraudulent; and, during the course of a mill-run of said mines, made by the plaintiffs for the purpose of testing the value of the ores contained therein, falsely and fraudulently, and with the intent thereby to deceive and defraud the plaintiffs, placed, and caused to be placed, in and among the ores to be reduced in said mill-run exceptionally rich specimens of ore, which were not part of the ordinary production of said mines, and placed, and caused to be placed, therein large quantities of exceptionally rich ore, which had been mined on said 20
premises; but reserved by him over a long period of time, and which carried gold far in excess of the average amount carried by the ore produced from said mines, and caused false and fraudulent representations to be made as to the amount of ore which was run through the mill at that time, understating the same, with the intent, and with the result, that a much larger production of gold might seem to be produced from the ore reduced than was just and true; and further falsely and fraudulently, and with the intent thereby to deceive and defraud the plaintiffs, represented to them that certain portions of said mines, from which all of the valuable 21
ore had been extracted, were still solid and untouched, and blocked up the entrance to such excavations with timber, which he falsely and fraudulently stated was placed in the mine for the purpose of support, and that it was dangerous to remove the same, with the intent and result of thereby preventing the plaintiffs and their representatives from investigating the condition of said mines; and falsely and fraudulently, and with the intent thereby to deceive and defraud the plaintiffs, changed certain bullion returns as to past production, and misstated the quantities of ore producing said bullion, so as to show a much larger and richer production of gold from the ore mined than had, in

22 fact, been made; said defendant making all of these representations, and doing and causing to be done all of these acts, with full knowledge that the same were false and fraudulent, and calculated to deceive and defraud, and with the intent and result that the same should be communicated to and acted upon by the plaintiffs, and with the intent and result thereby to deceive and defraud the plaintiffs, and to induce them to believe that said lands and mines and mining claims and the appurtenances thereto and the property thereupon were worth at least the sum of one million dollars, and
23 to induce them to purchase the same.

VI.—If said representations and reports and mill run hereinbefore mentioned had been true and correct, and had accurately stated and shown the amount and value of the ore contained in said mines and mining claims, said lands and mines and mining claims and the appurtenances thereto and the property thereupon, would have been reasonably worth at least the sum of one million dollars. But, in fact, said representations and reports and mill run hereinbefore mentioned were, and each of them was, and were, and each of them was, known by the defendant to be untrue and in-
24 accurate and false and fraudulent, and said lands and mines and mining claims, and the appurtenance thereto and the property thereupon was, and and was known by the defendant to be, worth practically little or nothing.

VII.—Thereafter, and on or about December 28th, 1893, the plaintiffs, believing said representations and reports and mill run hereinbefore mentioned to be true and correct, and relying thereupon and induced thereby, purchased said lands and mines and mining claims, and the appurtenances thereto and the property thereupon, for the sum of $400,000, and paid therefor to the defendant the sum of $150,000 in cash; and executed, and caused

to be executed, and delivered certain notes and 25
mortgages upon said property, aggregating the sum of $225,000, as part of the purchase money therefor; and have since paid to the defendant and others large sums of money on account of said notes and mortgages; and have paid, laid out and expended upon said property, in the attempt to develop the same, large sums of money in addition thereto.

VIII.—By reason of the premises and of the facts hereinbefore stated, the plaintiffs have been deceived and defrauded by the defendant to their damage in the sum of one million dollars. 26

IX.—The plaintiffs, throughout the transactions hereinbefore mentioned, were acting jointly for their own benefit, and for the benefit of others associated with them in the enterprise, and the contract of purchase hereinbefore mentioned was made with the plaintiffs, and in their name, for their own benefit, and that of their said associates jointly interested with them, and they now sue as the trustees of an express trust, in accordance with the laws and practice of the State of New York.

X.—There is involved in this suit a controversy 27
between citizens of different states, and the matter here in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of one million dollars, with interest thereon from December 28th, 1893, together with the costs and disbursements of this action.

STICKNEY, SPENCER & ORDWAY,
Plaintiffs' Attorneys.

28 SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

SAMUEL H. ORDWAY, being duly sworn, says: I am one of the attorneys for the plaintiffs in this action; the foregoing complaint is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The grounds of my belief as to all matters therein not stated upon my own knowledge are copies of original papers and letters referring to the transactions therein mentioned, and of the written state-
29 ments of witnesses to the facts therein alleged, all of which are now in my possession, and oral and written statements made to me and my firm by the plaintiffs and their agents and attorneys.

The reason why this verification is not made by the plaintiffs in this action is that neither of them is within this county or district, where I reside and have my office, and capable of making this affidavit.

SAMUEL H. ORDWAY.

Sworn to before me this 4th day of April, 1895. }

30 E. W STARR,
[SEAL.] *Notary Public,*
Kings County.

Certificate filed in New York County.

Endorsed: United States Circuit Court, Southern District of New York—Dudley Porter and others against James M. Sigafus—Summons and Complaint—Stickney, Spencer & Ordway, attorneys for plaintiffs, 31 Nassau Street, New York City—I hereby certify that, on the 4th

day of April, 1895, at the City of New York, in my district, I personally served the within summons and complaint upon the within-named James M. Sigafus, by exhibiting to him the within originals and at the same time leaving with him a copy of each thereof. John H. McCarty, United States Marshal, Southern District of New York Dated Aug. 30, 1895—U. S. Circuit Court. Filed Aug. 30, 1895. John A. Shields, Clerk. 31

UNITED STATES CIRCUIT COURT, 32

SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and CHARLES W. MORSE, *Plaintiffs*, vs. JAMES M. SIGAFUS, *Defendant*.	*Answer*. 33

The above-named defendant, by Niles & Johnson, his attorneys, answering the complaint of the above-named plaintiffs, says, for his answer and defense:

I.—That he has no knowledge or information sufficient to form a belief that the plaintiffs, or any of them, were citizens and inhabitants of the Commonwealth of Massachusetts, or residents of the City of Haverhill, at all times mentioned in the complaint herein, or at any time, and therefore denies said allegations, and each of them.

II.—Denies that, some time prior to, or down to, or on or about December 28th, 1893, he was the owner of the entire capital stock of the Good Hope Consolidated Gold Mining Company, or corporation, mentioned in the complaint, or that, with the exception of shares in the name of his son-in-law, James Everett Bird, or with the exception of a few shares, he was the owner of the entire capital stock of said corporation; and he

III.—Further denies that, on or about the 28th day of December, 1893, or for some time prior thereto, he was, in fact, the sole owner, or sole beneficial owner, of the lands, mines, mining claims and appurtenances thereto, or property thereupon, or any or either of them, mentioned in the complaint herein.

IV.—Denies that he, during said period, or the period mentioned or referred to in the complaint, and previous to the 28th day of December, 1893, or at all, representing his own interests and those of said Good Hope Consolidated Gold Mining Company, and of said Bird or any of such interests, or at all, entered into negotiations with the plaintiffs for a sale to them of said lands and mines and mining claims, and the appurtenances thereto and property thereupon, or any of it, directly or through one William H. Griffith.

V.—Denies that he has any knowledge or information sufficient to form a belief as to the allegations in subdivision of said complaint marked "V"; that during said period, and previous to the 28th day of December, 1893, the plaintiffs entered into negotiations for the purchase of the land and mines and mining claims and appurtenances or property thereupon, or any or either of them, mentioned in the complaint, and therefore denies each and every of said allegations; and he denies that he has any

knowledge or information sufficient to form a be- 37
lief as to any negotiations of the plaintiffs, or any of them, in regard to, or in any way relating to, said property prior to that date, or prior to the conveyance of the property by the said Company.

VI.—Denies that he, in the course of the alleged negotiations mentioned in said complaint, or at all, represented to the plaintiffs, or any of them, that the lands and mines or mining claims, or any of them, mentioned or referred to in the complaint, contained a large or valuable vein of gold-bearing ore, or large or valuable deposits of gold, and he in like manner denies that he represented that all the 38
gold-bearing quartz, or any of it, in said lands or mines or mining claims, or any of them, would average in milling more than $16 per ton; and he

VII.—Denies that he laid before the plaintiffs, or any of them, a report or statement in writing in regard to said lands, or mines or mining claims, or any of them, made by one Burnham, or by anybody, or any report or statement in writing, in which said Burnham, or any one, was reported and represented to be an independent or disinterested mining engineer or expert, or to have made a careful or complete examination of the premises; and 39
he

VIII.—Denies that he laid before the plaintiffs, or any of them, a report stating in substance as alleged in the complaint, or any report or statement, stating that the pay-streak in said mines had an average width of two feet, or stating that 2,434 tons of ore from said mine had been milled and had yielded an average value in gold of $23.78 per ton, or stating that said mines had been operated, and the ore taken therefrom had been milled for a considerable length of time, to wit, for two years or more, or any length of time, or stating that the ore

produced in said mines had yielded in gold an average of $23.78 per ton, or stating that the value of bullion produced from said mine for the twelve months ending with January, 1892, inclusive, or any length of time, was $57,879.78, or stating that the total expense of said production was $15,500, or stating that the estimated total bullion production from said mine since its discovery down to about February 1st, 1892, or for any period, was $517,879.78, or stating that, beyond all doubt, or beyond any doubt, the ore in said mine averaged to carry at least $18 per ton in gold, or stating that said mine or mines contained 44,733 tons of gold ore in reserve, or stating that the gold ore in reserve was of the net value of $805,186, or stating that said mines contained 37,333 tons of gold ore in sight, or stating that such gold ore in sight was of the net value of $761,094, or stating that said mines or mining claims had a very large prospective value in addition thereto, or stating that the gold-bearing vein in said mine was a permanent and lasting one, or stating that said property, under energetic management, should produce from $30,000 to $40,000 a month net, and keep the development even with the output, or containing other statements of fact in regard to said mine, mines, mining claims, lands and property; and he

IX.—Denies that he represented to plaintiffs, or any of them, that said alleged report or statement, or any report or statement, was just or accurate or true; and he

X.—Denies that he made any of the representations, statements or reports alleged in the complaint to have been made by him, or any representations, statements or reports in regard to such property, falsely or fraudulently, or with intent thereby to deceive or defraud the plaintiffs or anybody; and he

XI.—Denies that he knew any representations made by him to said plaintiffs, or any of them, in regard to said property, or any of it, to be false or fraudulent. 43

XII.—Defendant, further answering, denies that he laid before the plaintiffs, or any of them, any false or fraudulent report or statement; and he denies that he represented said alleged report or statement, or any report or statement laid before plaintiffs, or either of them, to be just or accurate or true, or that he knew any such report or statement, or any part of it, to be false or fraudulent.

44

XIII.—Denies that during the course of a mill run of the mines mentioned or described in the complaint, alleged to have been made by the plaintiffs for the purpose of testing the value of the ores contained therein, or any mill run alleged to have been made by the plaintiffs, or anybody, did he place, or caused to be placed, in or among the ores to be reduced in said alleged mill run, exceptionally rich specimens of ore, or any specimen of ores, which were not a part of the ordinary production of said mines; and he denies that he placed, or caused to be placed, therein large or any quantities of exceptionally rich ore which had been mined on said premises, but reserved by him over a long period of time, or which carried gold far in excess of the average amount carried by the ore produced from said mine, with the intent thereby to deceive or defraud plaintiffs, or any of them, or at all; and he denies that he caused false or fraudulent representations to be made as to the amount of ore which was run through the mill at such alleged time; and he denies that he understated, or caused to be understated, the same, or that he represented to the plaintiffs or to any of them that certain portions of said mines from which all the valuable ore had been extracted was still solid or untouched; and he denies that he blocked up the entrance to 45

such alleged excavations with timber; and he denies that he falsely or fraudulently stated that such timber or timbers was placed in the mine for the purposes of support, or that it was dangerous to remove the same, with the intent or result of preventing the plaintiffs or their representatives from investigating the condition of said mines, or at all; and he further denies

XIV.—That he changed certain alleged bullion returns, or any bullion returns, as to the past production of said mine; and he denies that he misstated the quantites of ore producing such bullion, or stated or mistated the quantity of ore producing any bullion, so as to show a larger or richer production of gold from the ore mined in said mines than in fact had been made; and he

XVI.—Denies that he performed, or caused to be performed, any of the acts or things alleged in the complaint to have been done, or caused to be done, by him, or made, or caused to be made, any statements or misstatements, falsely or fraudulently, or knowing the same to be false or fraudulent, or with intent thereby to deceive or defraud the plaintiffs, or with intent thereby to prevent the plaintiffs or their representatives from investigating the condition of said mine; and he further

XVII.—Denies that he made any or all of such alleged representations with full knowledge, or any knowledge, that the same were false or fraudulent, or calculated to deceive or defraud, or with intent or result that the same should be communicated to or acted upon by the plaintiffs, or with the intent or result to thereby deceive or defraud the plaintiffs, or in order to induce the plaintiffs to believe that said lands, or mines, or mining claims, or appurtenances thereto, or property thereupon, was worth, at least, the sum of one million dollars, or

any sum, or to induce them to purchase the same; 49
and he further

XVIII.—Denies that he has any knowledge or information sufficient to form a belief that if the representations and reports and mill runs mentioned in said complaint had been true or correct, and had accurately stated and sworn the amount and value of ore contained in said mine and mining claims, said lands and mines, and mining claims, and the appurtenances thereto, and property thereupon, would have been reasonably worth the sum of one million dollars. 50

XIX.—Denies that he made any representations, or reports, or mill run, as alleged in said complaint, or that any representations, reports, or mill run, represented or made by him, were known by him to be untrue, or inaccurate, or false, or fraudulent; and he denies that the said lands and mines, and mining claims, and appurtenances, and the property thereupon, were worth little or nothing, or were known to him to be worth little or nothing, but on the contrary,

XX.—He denies that he has any knowledge or 51
information sufficient to form a belief as to whether thereafter, and on the 28th day of December, 1893, or at any time, plaintiffs, or any of them, believed said alleged representations or reports or mill run to be true or correct, or believing them to be true or correct, or relying thereupon, or induced thereby, purchased said lands and mines and mining claims and appurtenances and property, and, therefore, denies each and every of such allegations; and he

XXI.—Denies that plaintiffs paid him the sum of $150,000 in cash therefor; and he

52 XXII.—Denies that he has any knowledge or information sufficient to form a belief that the plaintiffs, or any of them, purchased said property for the sum of $400,000; and he

XXIII.—Denies that the plaintiffs executed, or caused to be executed, and delivered certain notes and mortgages upon said property, aggregating the sum of $225,000 as a part of the purchase money thereof upon the sale mentioned in the complaint, or any sale, in which the defendant was interested as in any sense as a seller; and he

53 XXIV.—Denies that he has any knowledge or information sufficient to form a belief that plaintiffs have paid to others large sums on account of said notes or mortgages, or have paid, laid out or expended, upon said property, in the attempt to develop the same, large or any sums of money; and he

XXV.—Denies that they have since paid or paid at all to the defendant any sums of money on account of said notes or mortgages; and he

XXVI.—Denies that by reason of the promises,
54 and of the facts stated in said complaint, or at all, have plaintiffs been deceived or defrauded by defendant to their damage in the sum of one million dollars, or any sum, or at all.

XXVII.—Denies that he has any knowledge or information sufficient to form a belief as to whether the plaintiffs through the transactions mentioned in said complaint, or at all, were acting jointly for their own benefit, or jointly for their own benefit and the benefit of others with them associated in the enterprise, or as to whether any contract of purchase mentioned in the complaint was made with the plaintiffs, and in their name, for their

own benefit and that of their said associates, jointly interested with them, or that they now sue as trustees of an express trust in accordance with the laws and practice of the State of New York, or any other State.

Wherefore, defendant demands judgment that the complaint herein may be dismissed, and that he may have his costs and disbursements in this action, and such other or further judgment or relief as may be proper or just to grant.

NILES & JOHNSON,
Defendant's Attorneys,
Office and Post-office Address,
11 Wall Street,
New York City.

STATE OF NEW YORK,
Southern District of New York, } ss.:
City and County of New York,

JAMES M. SIGAFUS, being duly sworn, says: That he is the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES M. SIGAFUS.

Subscribed and sworn to before me this 23d day of May, 1895.

HARRIETTE L. JOHNSON,
Notary Public,
[SEAL.] City and County of New York.

58 Endorsed: United States Circuit Court, Southern District of New York—Dudley Porter, John L. Hobson and Charles W. Morse, plaintiffs, against James M. Sigafus, defendant—Answer—Niles & Johnson, attorneys for defendant, 11 Wall Street, New York City—U. S. Circuit Court, filed May 23, 1895. John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York,
59 in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Monday, the sixth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Present—

The Honorable WILLIAM J. WALLACE,
Circuit Judge.

DUDLEY PORTER *et al.*

60 *vs.*

JAMES M. SIGAFUS.

Now come the plaintiffs, by Albert Stickney, Esq., their attorney, and move the trial of this cause.

Likewise comes the defendant, by Edmund Wetmore, Esq., his attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties, the argument of counsel and the charge of the

Court, the jury retire on April 16th, 1896, in charge of an officer duly qualified to attend them, and upon their return they say that they find a verdict for the plaintiffs for the sum of three hundred and thirty thousand two hundred and seventy-five dollars ($330,275.00/100), and so they say all. 61

Thereupon the Court denies a motion to set aside the verdict and for a new trial.

A stay of thirty days is granted the defendant within which to make and serve a case, with leave to turn the same into a bill of exceptions.

An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, 62
Clerk.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and Charles W. Morse,
Plaintiffs,
against
JAMES M. SIGAFUS,
Defendant. 63

On reading and filing the notice of motion on behalf of defendant herein, dated April 16, 1896, and upon the minutes of Hon. William J. Wallace, United States Circuit Judge, before whom this action was tried, and upon the evidence adduced upon the trial thereof, and exceptions taken by the defendant on said trial and the verdict of the jury,

the motion so noticed to set aside said verdict and grant a new trial in the above-entitled action upon said exceptions, and because said verdict is for excessive damages, and because the same is contrary to the evidence, and against the weight of evidence, and because the same is contrary to law, and upon each and every of said grounds, and for other order or relief, coming duly on to be heard upon the 23d day of April, 1896; and after hearing Edmund Wetmore, Esq., of counsel for defendant, in support of said motion, and Albert Stickney, Esq., of counsel for plaintiffs, in opposition thereto;

Now, upon motion of Stickney, Spencer & Ordway, attorneys for plaintiffs,

Ordered that said motion be, and the same is, hereby denied.

WM. J. WALLACE.

Endorsed: U. S. Circuit Court, Southern District of New York—Dudley Porter *et al.*, plaintiffs, against James M. Sigafus, defendant—Order—Niles & Johnson, attorneys for defendant, 11 Wall Street, New York City—U. S. Circuit Court. filed June 20, 1896. John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES, 67

FOR THE SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and Charles W. Morse,

Plaintiffs,

against

JAMES M. SIGAFUS,

Defendant. 68

Judgment, July 7th, 1896.

The issues in this action having been brought on for trial before Hon. William J. Wallace, Circuit Judge, and a jury, at a Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held on the 6th day of April, 1896, at the United States Court Rooms, in the City of New York, and the defendant appearing by counsel, and the issues having been tried, and a verdict for the plaintiffs having been duly rendered 69
on the 16th day of April, 1896, for the sum of three hundred and thirty thousand two hundred and seventy-five dollars ($330,275.00/100), and the costs of said plaintiffs having been adjusted at six hundred and forty-nine 80/100 dollars; now, on motion of Stickney, Spencer & Ordway, Esqrs., attorneys for the plaintiffs, it is

Adjudged, that the said plaintiffs, Dudley Porter, John L. Hobson and Charles W. Morse, do recover of said defendant, James M. Sigafus, the sum of three hundred and thirty thousand two hundred and seventy-five dollars ($330,275) found by the jury, with four thousand four hundred and two 75/100 dollars, interest thereon from the date of

said verdict, and six hundred and forty-nine 80/100 dollars costs, amounting in all to the sum of three hundred and thirty-five thousand three hundred and twenty-seven 55/100 dollars, and that said plaintiffs have execution against the property of said defendant, James M. Sigafus, therefor; and, it appearing from the pleadings that the nature of this action is such that the plaintiffs are entitled to arrest said defendant, that the plaintiffs have execution against the person also of said defendant, James M. Sigafus.

Judgment signed this 7th day of July, 1896.

JOHN A. SHIELDS,
Clerk.

Endorsed: United States Circuit Court, Southern District of New York—Dudley Porter and others against James M. Sigafus—Judgment—Stickneey, Spencer & Ordway, plaintiffs' attorneys, 35 Nassau Street, New York City—U. S. Circuit Court, filed July 7, 1896, 2.15 P. M. John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES 73

FOR THE SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and CHARLES W. MORSE,

Complainants,

against

JAMES M. SIGAFUS,

Defendant. 74

CASE OR BILL OF EXCEPTIONS.

Afterward, to wit, on the 6th day of April, 1896, and at a stated term of this Court, held at the City of New York, to wit, on the 6th day of April, 1896, before the Hon. William J. Wallace, the aforesaid issues were joined as between the said parties, as by the record more fully appears, and came on to be tried by a jury duly empanelled and sworn for that purpose, said trial having continued until 75 April 16th, 1896; said plaintiff being represented by Mr. Albert Stickney and Boyd B. Jones, and the said defendant by Mr. Edmund Wetmore and Mr. Henry B. Johnson; and in the course of the trial the said counsel for defendant did take and allege sundry exceptions to the rulings of the Court, both as to the admission and exclusion of testimony and to the refusal to dismiss the complaint, and to the charge, and to the refusal to the charge, of the Court, which said exceptions are hereinafter specifically set forth.

The plaintiffs then read depositions of witnesses called for plaintiffs.

76 James B. Doran.

JAMES B. DORAN, by deposition taken April 17, 1895, on behalf of the plaintiffs, testified as follows:

I live near the Good Hope Mine, Perris, California. I have been a miner for about twenty-four years. I have done nearly every thing from a toolboy up to superintendency. I have worked in the mine, have acted as boss, foreman, superintendent, and do milling in the stamp mills. I am not an assayer, but have had a great deal of practical experience in assaying. I am unable, by reason of sick-
77 ness, to travel.

I know James M. Sigafus, the defendant. First met him at the Good Hope Mine in August, 1889. I have worked in that mine; began the latter part of August, 1889, and worked until August, 1893, when I was taken sick. Mr. Sigafus employed me and gave me my instructions and paid me. While I worked at the mine Sigafus controlled and managed its operation.

A shaft is an entrance into a mine from the surface for the purpose of working it. A level is an opening driven laterally into a mine from the shaft for the purpose of carrying ore to the shaft. A
78 chute is an opening from level into a stope to take the ore from stope to level. A stope is an opening made above a level where the ore is taken out. A man-hole or man-way is an opening into stope from level. Stulling is heavy timbers fastened into the walls of a mine, and lagging is boards put on stulls to hold the ground above.

Mine shut down for a short time a number of times. Mr. Sigafus ordered it shut down and started up. The first work I did there was the sinking of the two shafts, the main working shaft, and one 300 feet north of it. In November, 1893, there were three shafts—No. 1 or South shaft; No. 2, Main shaft; No. 3, North shaft; there were two

79

levels, one 250 feet from the surface, and the other 350 feet from the surface. The visible length then (November, 1893), of the first level was about 950 feet. The second level about 1,000 feet. Neither level existed when I began to work at the time. After I had timbered the old south shaft, Mr. Sigafus asked me to take charge of the mine, and I did so until my sickness in August, 1893. I had very good opportunities to know the width of the ore vein. I had measured every foot of that vein that was exposed. The average width in November, 1893; was 18 inches. I also know of the rich- 80
ness of the ore. I panned it and made assays at the office, I mean Mr. Sigafus and myself.

Q. Are you able to state, with substantial accuracy, the average richness of the ore in the Good Hope Mine in November, 1893?

Objected to by defendant's counsel as incompetent and calling for an opinion. Objection overruled. To which ruling of the Court defendant's counsel then and there duly excepted.

A. Yes, sir. The value was $8 per ton in free gold, and a small value beside that in sulphurets, 81
we called it a dollar and a half per ton. I mean by we, Sigafus and myself.

I have owned gold mines myself in three different properties.

The end of the vein in the Good Hope Mine was very like peas in a pod, or in other words, in little kidneys of ore, lying laterally and vertically about the same, odd and even, in the ground like a checker board. In driving the drift ore would come in and pinch out. By stoping out the pinch up to another kidney of the ore made it look like a continuous vein, while it was not. One half of the ground was barren. By the ore's pinching

82 James B. Doran.

out, I mean as we came into unexplored ground, we encountered a kidney of ore for a few feet, and then we encountered barren ground or waste ground. There were two or three heavy breaks in the ground exposing barren ground for as much as a hundred feet or more. Between these barren places there would be ore bodies. Above the breaks sometimes it would be ore-bearing rock, and sometimes it would not. In these large breaks there was usually nothing, and in the smaller ones we would generally get ore
83 by working up. There was one large break north of the main working shaft in both levels—about 150 feet north of the working shaft, and another about 500 feet from the working shaft. That showed in both levels. There was one south about fifty or sixty feet from the shaft. It shows in both levels. There is a long break at each end of No. 2 level. Sigafus said he owned the mine. A number of times Sigafus talked with me about economizing and cutting down expenses, as it all came out of him and was not like a company. He stated that Mr. Bird had no money but would acquire an interest in the mine after it had paid him, Sigafus, back his money. I also had these talks
84 quite often. I could not say how often."

Q. While you were employed at said mine, what, if anything, did you hear said Sigafus say in regard to what disposition or use he wanted to make of said mine?

Objected to by defendant's counsel as immaterial; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

A. He said he wanted to sell it.

Q. While you were working at said mine what, if anything, did said Sigafus say to you about preparing the mine for sale?

James B. Doran. 85

Objected to by defendant's counsel as immaterial; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

A. His instructions to me was that he wanted to sell it and for me to keep it in the best condition possible; to keep all the good ore possible in sight in the mine and to cover up all poor places and barren spots as far as I could.

Q. When did he give you said instructions, and, if more than once, how often?

86 Objected to by defendant's counsel as immaterial; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

A. He usually gave them when he expected parties to examine the mine; at different times; I don't remember how often.

Q. What, if anything, did you do to keep good ore in sight?

Objected to by defendant's counsel as immaterial; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted. 87

A. We just didn't take out the good places, but left it where it could be seen and examined. It was by Sigafus's orders that this was done. I carried them out. He knew it.

Q. What, if anything, did you do to cover or hide said barren spots and poor places?

Objected to by defendant's counsel as immaterial; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

A. I stulled and lagged them and covered them up with timbers. Sigafus knew I did it.

88 James B. Doran.

Q. Would the samples so taken be richer or poorer than the average of the mine?

Objected to by defendant's counsel; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

A. They would be richer, and the difference would be a considerable one.

I know John M. S. Egan. I see him, in November, 1893, at the Good Hope Mine. He was
89 making an examination of the property. Mr. Sigafus and I consulted nearly every evening. He told me that Egan was here, inspecting the mine and examining it, with a view of buying it for Eastern friends. Outside of that there was not very much said. Sigafus said that he was very much afraid of the mill test not holding up with the assays; that the ore in the mine assayed higher than it would mill. In November, 1893, the poor and barren spots in the mine had been hidden to the extent of about 500 feet. All the good ore was left, except what we dug out in driving through it to open it up. Very little of the good ore was stoped.
90 The second level south had been driven 180, possibly 200, feet south of the south shaft in 1892 and 1893. The last time Sigafus was in that drift he ordered the discontinuance of the work, as there was no ore there, and to shut up the entrance to the drift at the shaft, so that nobody could get in there. He said that to me. It was timbered with shaft timbers, and lagged in behind the timbers, so that it was not apparent that the level had been driven south of the south shaft; he said to me that he did not want prospective buyers to see it; it would do no good in making the sale.

Before November, 1893, the second level north had been driven about 800 feet north from the main shaft. In two barren places it was timbered up.

The last eighty or ninety feet showed no ore, and a raise was then driven at the point where the ore gave out, and the material from said raise was put into the drift to close it up, and hide that last end of the drift. The extension of the drift beyond that point could not be seen without close examination. Sigafus said he wanted to hide that poor place, and would not have that drift drove any further.

Q. How soon after you began the work at said mine did Sigafus first talk of selling it?

Objected to by defendant's counsel as im- 92
material; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

A. About four months. Most of the time I was working at the mine. There was a trade pending between Sigafus and somebody. I left the good ore and covered up the barren places for a period of about three years.

The capacity of the Bryan mill was a ton an hour. When I went there there was a five-stamp mill, which was taken away in the summer of 1890, and the Bryan mill was erected in February, 1891. There was about 300 tons of ore mined in 93
1889, and about twelve or fifteen hundred tons in 1890. It was milled in 1891. It averaged about $10 per ton. In 1891 about 1,000 tons were mined. It was milled as it was mined. In 1893 the mill averaged about ten or twelve tons per day.

Q. Did you have any information from said Sigafus as to whether the operation of the mine was profitable or otherwise? If you did, state what he said about it, and when he said it.

Objected to by defendant's counsel as incompetent; objection overruled; to which ruling of the Court defendant's counsel then and there duly excepted.

94 James B. Doran.

A. At different times during this period of time he said all that he wanted the mine to do was to pay the current expenses. That there was months it was short, and that to make up for this shortage he would ask me to sort the ore closer for the next month, and get a better class of ore. The last talk of this nature was in 1893.

I have seen this document before. (Witness shown paper entitled "Mining Report of the Good Hope Consolidated Gold Mine.") I have a copy of it. I find this an exact copy. It was prepared by
95 F. R. Burnham. I don't know whether this is the report itself, or only a copy. I gave Sigafus this document in November, 1893. He never returned it. He said he wanted to send it to Mr. W. H. Griffith.

Q. If you know what said Burnham did to make said report, or how he got the information from which said report was made, state what he did, and how he got his information.

Objected to by defendant's counsel as incompetent, irrelevant and immaterial; objection overruled; to which ruling of the Court defendant's counsel then and there duly ex-
96 cepted.

A. Yes, I do know. He first measured the tonnage. He measured it every ten feet on the vein where the vein was exposed. He approximated on all ground timbered and lagged up. He then sampled at each point measured. After that he assayed the samples taken, and the ground approximated in measurement was also approximated in value with that which was actually sampled. He did not make any mill test. His information he got from Mr. Sigafus and Mr. Bird; on that he framed his report. I saw him measure the pay streak with a rule. I also saw him make the measurements and take the samples. He measured the width of the pay streak,

97

including the soft talc gouge which lay on the top and bottom side of the vein, and was waste matter. In taking the samples he took the pay streak, but did not take any of the soft talc gouge.

Q. How did he obtain the returns of gold bullion recited in said report?

A.. Those he got from Mr. Bird. Bird was secretary here at the mine at that time. I was present at the time. In the spring of 1893 Sigafus said that the tonnage of the ore reserves was about 25,000 tons. Sigafus knew Burnham was engaged in preparing this report. In 1893 Sigafus was engaged in operating other gold mines in New Mexico and Arizona, and received samples at the Good Hope Mine of very rich gold ore from the other mines. In the winter of 1892 and 1893 we ran into a very rich pocket. Kingsbury mined it. It would mill about a hundred dollars a ton. The richest part of it was sacked and left in stope. Sigafus said he wanted to use it in case prospective buyers exacted a mill test.

98

Egan was making a mill run in November, 1893. I remember some rich samples being in the house. I should judge there was seventy-five to a hundred dollars worth, in coarse gold and amalgam and samples in the house. I don't know positively. They were high grade ore. During the mill run I saw Sigafus put them in the mill. I was just above his head on the rock-crusher floor—about twelve feet from him. I don't think he see me at all. I was on the floor that projected out from the mill; by looking down I could see him, and if he looked up he was bound to see me. The noise of the mill would prevent hearing anything. Egan was at the office or assay-room. There were two keys to the office.

99

After the time that I saw Mr. Sigafus doing what I have just described, I never again saw the coarse gold which I mentioned. I remember when

Griffith was there, about in July, 1893, and attempted to sell the mine. Sigafus then said the mine was worth something. What he wanted was a *bona fide* offer. If that offer was as good as a hundred thousand dollars, he would take it. He said after the offer he would parley with them long enough to take out twenty or thirty thousand dollars, and then would let them have the mine; that he was going to sell the mine and get away from here. In my opinion in the fall of 1893 the mine was fairly worth $100,000—a little more or a little less.

Cross-examination:

My observation has been that there are rich places and poor places in all mines. I never saw a mine that maintains its uniformity of richness throughout. When Mr. Sigafus consulted with me I was his employee. I received three dollars per day to keep up my expenses, with a contingency of five per cent. on the sale of the mine, in consideration of the low salary I received. I had an interest in the sale of the mine of five per cent. upon the proceeds of such sale, to be paid to me by Mr. Sigafus. The mine was sold in the last of December, 1893.

Q. Did you receive that compensation that you expected from Mr. Sigafus upon the sale of the mine?

A. As yet, I have not.

Q. Have you not brought a suit in the Superior Court of Los Angeles County against Mr. Sigafus for such commission, and also for other alleged services performed by you, in which you claim damages for $25,000?

A. Yes, sir. That suit is still pending. He has never been served with summons and complaint.

Q. Don't you know that service can be made by publication upon a non-resident defendant in this

State, and that if you wanted to, you could have had service upon him over a year ago? 103

A. No; I don't know it. The condition of my health and pocket-book would not admit of it.

Q. Didn't you ask Mr. Sigafus to let Burham examine the mine?

A. I may have. I may have stated in a former deposition that I did. I think my memory is as good now as it was at that time.

Q. Was it not understood by you, and agreed between Burnham, Maxwell and yourself, that if the mine was sold at that time that a commission 104
of ten per cent. from the sale of the mine was to be divided between you?

A. No, there was no agreement; but they said they would give me something out of the ten per cent.

To a question like this in my former deposition I answered "yes." Burnham and Maxwell were only promotors trying to sell the mine. I think I stated to Griswold that Mr. Sigafus asked $500,000 for the mine. I paid Griswold's expenses to the mine. He came at my solicitation. In the bond to Maxwell and Burnham the price was $350,000 net if the sale took place.

I guessed at the value of the coarse gold in that pan by being familiar with that kind of material. I don't remember how long the pan was in the pitcher—several weeks, I think. 105

Q Did you not write to Mr. Sigafus on the 12th day of May, 1893, in which you stated you had an understanding with Mr. Griswold, who was contemplating purchasing the mine?

A. Yes; I did.

Q. Did you not state to Maxwell and Burnham, when they were examining the mine, as testified to by you, that you would see to it that they got a bond on the mine for $500,000?

A. I don't remember. I will not swear I did not.

I don't remember being suspicious of Maxwell and Burnham at that time. I may have asked Mr. Sigafus to protect me in that connection. Mr. Sigafus wrote to me to make them pay me a commission out of the ten per cent. and he would pay me, which would make two commissions. That was the five per cent. I referred to.

Q. The negotiations carried on at that time were upon a $500,000 valuation, were they not?

A. Yes, sir.

Q. How was the weather at the Good Hope Mine
107 at the time of the mill run by Col. Egan in November, 1893?

A. If I recollect right, the weather was fair, but cold. There had been a snow storm on or about that time.

Q. The feelings between yourself and Sigafus are not very friendly, are they?

A. I don't feel very kindly towards him.

Q. You didn't say anything to Col. Egan, or any one connected with him, about what you saw Mr. Sigafus doing at the mill with the coarse gold and amalgam, did you?

A. No, sir.

108

BELLE DORAN, by deposition, on behalf of the plaintiffs, testified as follows:

I live at the Good Hope Mine, near Perris, and am acquainted with the defendant, Mr. Sigafus. I know Mr. Egan and Mr. Griffith. I was at the Good Hope Mine when Mr. Egan and Mr Griffith were there testing the mine in November, 1893. I was then living in a house belonging to Mr. Sigafus at the Good Hope Mine. Mr. and Mrs. Sigafus occupied the first floor; my husband and I occupied the second floor. There was a grate in each room, and a chimney leading up connecting the two

rooms. I heard conversations between Mr. Sigafus and his wife regarding the mill test of which I have spoken as made by Col. Egan. During the time of the examination I did some trading with the groceryman, and took some change up-stairs and laid it on the mantel above the grate in my kitchen. When I was through with my work in the evening I went to take the change off the mantel; in doing so I dropped it on the hearth. I got down to look for it, and heard a conversation between Mr. and Mrs. Sigafus about the mill test. The first words that attracted my attention were as follows: Mrs. 110
Sigafus said, "How are they getting along with the examination?" Mr. Sigafus answered, "Pretty satisfactorily, I guess." Mrs. Sigafus said, "How about the mill test?" Mr. Sigafus said, "I fear the ore being put through the mill will not equal the assays; that is all the fear I have." There were some other words that I did not catch. Mr. Sigafus then said, "Where is that pan of sulphurets and coarse gold?" She answered him, "Up-stairs, in Mr. Doran's kitchen." She said, "What are you going to do with it?" He answered, "Put it in the mill, of course." They then began talking about some other matters, and I didn't pay any attention 111
to them. Mr. and Mrs. Sigafus, during this conversation, were in their bed-room, directly beneath me. I could not hear conversations from one room to the other unless we were near the grate—the chimney. We could hear voices and talking at any time; we could not distinguish words unless we were near the grate in the chimney.

Q. Was there any communication between the lower chimney and your chimney, or how did the sound get there?

A. There was a crack in the chimney. When there was a fire made in the lower grate there would be a great deal of smoke come into our room.

The pan of sulphurets and coarse gold to which Mr. Sigafus referred at that time was sitting on the mantel in my room. My husband brought it up-stairs to show me, but where he got it I don't know. Mr. and Mrs. Sigafus came with him when he brought it up-stairs, and we discussed its contents. At the time we were talking of the pan Mr. Sigafus said he thought that pan contained something near $75. I have no knowledge of its value beyond what Mr. Sigafus told me. I took the pan of sulphurets with me to my husband's room, and told him of
113 the conversation I heard. Mrs. Sigafus came up-stairs the next morning and asked if I knew where the pan of sulphurets was that was in my kitchen. I told her that I did, and got the pan for her. She had her hands full of quartz samples. I asked her what she was going to do with them. She said, "Take them down-stairs, as Mr. Sigafus wanted them." She took it down-stairs. I saw Mr. Sigafus shortly after she took the pan down stairs; he was going south, toward the mill. He had nothing in his hands until he got to the corner of the garden. He then took from his pockets what appeared to me to be quartz samples. He turned towards the east and stood where the sun shone on the samples,
114 and he stood and examined them for several minutes. I had seen the quartz samples that Mrs. Sigafus had in her hand before that time. They were given to me for rich samples; I was told that they were rich when they were given to me. I never saw those samples again after this time. I went and told my husband what I had seen, and he put on his hat and muffler, and said he would go to the mill too.

Cross-examination:

We occupied that house as tenant. We left the house in January, 1894. The settlement was made

in April or May, 1894; it was made through Lawyer Knight, of Los Angeles. We were to stay a couple of weeks. Mr. Doran took sick there, and we staid on until the sale was made. Mr. Sigafus didn't go off to New York, as he expected. Then, at the settlement, we were charged $10 a month for every month we were there.

Q. The relations between your family and that of Mr. Sigafus, during the entire time you occupied that house together, were cordial and intimate, were they not?

A. They were, from the time we went into the 116
house until the day when Mr. and Mrs. Sigafus went out. They ceased with the parting between Mr. Doran and Mr. Sigafus. There is no friendship existing between the two families. I cannot tell the day of the month of the mill test. It was cold; we had great trouble about keeping up fires—I remember that. The entire up-stairs was at our disposal. Mrs. Sigafus used them also as bedrooms for guests. and the Sigafus family occupied the lower floor. The room immediately below my kitchen, where I heard the conversation, was their bedroom.

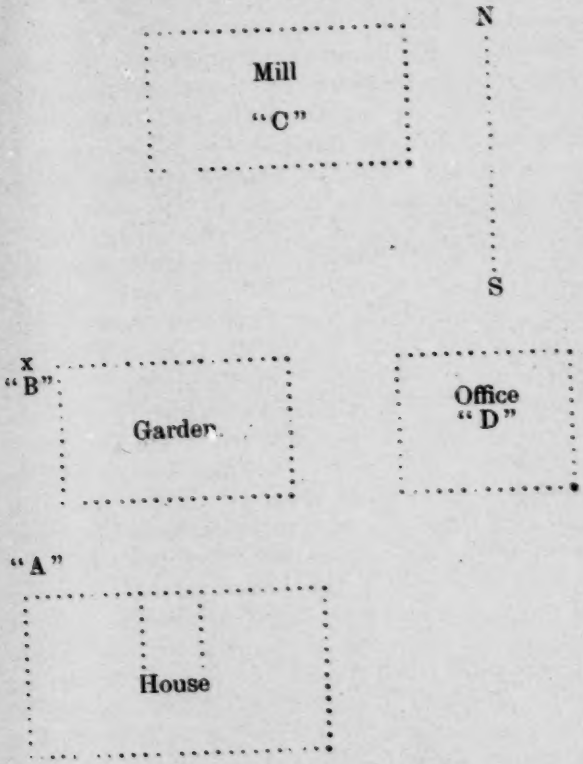
The accident of dropping my money caused me 117
to get down on the hearth right by the crack. I could not hear their conversation unless I got down and placed my ear by the crack near the hearth. I do not remember the exact date. It was in the evening. I had my ear to the crack in the chimney, listening sufficiently long time to hear what I have stated. I removed my ear when Mrs. Sigafus began to ask her husband about the mail received that day. I did not say anything to Mr. and Mrs. Sigafus the next morning of the conversation overheard the night before. I did not inform Col. Egan or Mr. Griffith, or any one connected with the examination, of the conversation. I saw them at a distance every day. We were living in the same

118 camp. I did not try to see them and speak to them; no, sir, I did not. We were anxious to have the mine sold. I didn't want this particular sale to fall through. The pan containing the sulphurets and coarse gold was about as large as the crown of a gentleman's straw hat, but not quite so deep. The pan was about half full of the material. It had been in my room several weeks. The pan stayed in my room on the mantel-piece for several weeks. That is the only instance that such a thing occurred in the house, so far as I know. I cannot
119 tell how much coarse quartz or gold was in the pan, and how much of the contents was sulphurets. When Mrs. Sigafus asked me for the pan of sulphurets next morning, no one was present beside myself. When I saw Mr. Sigafus examining quartz samples, I was standing at my kitchen table; my attention was called to some one passing, and it was Mr. Sigafus going towards the mill.

120

121

Mrs. Doran makes a diagram of the location of the mill, house and office, and the mill where the test was made.



122

123

"A," window where I stood when I saw Mr. Sigafus.

Sigafus stood at X, marked "B." "C," mill where test was made. "D," Company's office.

Witness has made diagram as requested, which the defendant offers in evidence, and asks the Commissioner to identify it, and attach it to the deposition as Defendant's Exhibit 1.

Sigafus stood at "B," the corner of the garden, several minutes, as he examined several different pieces before he started for the mill "C." When he left "B," he went towards "C," the mill. "A" represents the kitchen in the second story, where I was standing. Mr. Doran at this time was in the northeast room in the house, on the second floor, about twenty feet, the length of the hall from where I stood at "A." My husband was sitting up in his room dressed. The first thing I said was, "What do you suppose has become of my samples?" I
125 don't remember what answer he made. Then I told him that I saw Sigafus with some samples of quartz going towards the mill, and he had stopped and examined them, and I believed they were my samples, and I said, "I wonder if he was going to put them in the mill?" Mr. Doran said, "I don't know what else he would do with them, and I guess I will go down to the mill, too." He got up and got his hat, and I believe I helped him on with his muffler. I was in the room with him at that time, probably three or four minutes, then Mr. Doran went down-stairs and passed out of the door at the northwest corner of the house, passed along west
126 of the garden and went down towards the mill. It was in the forenoon, probably about ten o'clock. It was some time during the last of November, 1893. The first I saw of the quartz samples, he took something out of his pocket about as large as an orange, only irregular, perhaps two, or two and a half inches square, something like that. I saw him examining three anyway. It is a common occurrence for men to be examining ore, rock and samples about the mine, that being their business. I never heard any other conversation through the medium of the crack in the chimney between Mr. and Mrs. Sigafus before or after that time. Mr. and Mrs. Sigafus at that time were talking in their ordinary tone of conversation. The evening when

they came home, after the sale of the mine, Mr. Sigafus and Egan came up to Mr. Doran's room; they didn't either sit down; they got an introduction, and said the mine would go into the hands of the new manager.

JAMES A. KINGSBURY, by deposition, on behalf of the plaintiffs, testified as follows:

My age is 44. Residence, Good Hope Mine. Occupation, miner. I have worked in the Good Hope Mine, situated in Riverside County, California. Mr. Doran employed me. Mr. Sigafus paid me up to the time of the change. I worked from December, three years ago, up to about the 19th of April, 1895, excepting the time the mine was shut down about two years ago. The biggest part of the time I was taking out ore. I know John M. S. Egan. I seen him a short time prior to Thanksgiving Day in 1893. There was a mill run made. I was working in what was then the second level, between the main shaft and the shaft south—about half way between. I know James R. Cheatham. At the time of said mill run said Cheatham was the foreman. 128 129

Q. At the time of said mill run did said Cheatham make any inquiries of you concerning certain sacked ore in the mine? If yea, state fully what he said in making said inquiries and what you said.

Objected to as incompetent and immaterial; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

A. He did ask me in regard to some ore in sacks that was in the stope in the first level, near the second manway, north of the main shaft. Cheatham asked me if it was good ore and I told him it was.

130 James A. Kingsbury.

Q. Who mined that ore?

A. I mined that ore. I think it was March or April, two years ago. I sacked the ore and I guess I put it in the sacks the same day I mined it, for when I was working there I sorted out the best ore that I thought, and put the rest into the chute. I worked there two or three weeks altogether and put the best ore in sacks. These sacks of ore was only a portion of what I sacked there altogether. It was hard white quartz, discolored more or less, and it was better ore than the average of the rock
131 that I worked in that stope. I can say that I see gold in it when I sacked it. I should judge the sacks were about two-thirds full; I never weighed it, but I should judge they would weigh about forty pounds each.

Q. In your opinion, what was the value per ton of said sacked ore.

Objected to by defendant's counsel as incompetent; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

A. It is pretty hard to put a value on it. In my opinion it would run $20 per ton or more.
132 I was putting in the ore the same as I would if there was no mill run; Cheatham accused me of not taking the waste out on purpose. I was putting it in just the same as I would if I was working in the mine to-day under ordinary work.

Q. Did you hear him say anything to any other person or give any orders to any other person about said ore that you had sorted? If yea, state what he said to the person about it and who that person was?

Objected to by defendant's counsel as incompetent; objection overruled; to which ruling of the Court counsel for the defendant then and there duly excepted.

A. I heard Cheatham tell Bev Boren to sort it as he took it out of the chute into the car; that is, the ore that I broke; and he did sort out close to a carload.

Q. What kind of ore was it he rejected and sorted out?

A. It was ore and waste together; some waste that would have been sent up at any other time.

Q. How much ore in weight did the cars that were used during the mill run hold as they were loaded during the ordinary operation of the mine?

A. I don't know how much a car holds. During 134
the mill run, there was some few cars I see sent up heaping full.

In April, 1893, the mine was shut down for five or six weeks. I was working in it on both levels before it shut down. After it started up I went to work on the second level, and I noticed sulphurets or concentrates on the second level from the main shaft to the south shaft, and after the sale of the mine I noticed them north of the main shaft on the lower level, and there is some there yet. I couldn't say whether those concentrates were there before the mine was shut down or not. On the first level I did not notice any sulphurets or concentrates. I 135
understood that the mine was shut down because Earnest Waters was coming to buy it.

Q. Do you know whether said Cheatham saw the said concentrates or sulphurets concerning which you have been testifying to; if yea, when did he see them, who was present when he saw them, and what, if anything, did you hear him say about it?

Objected to by defendant's counsel as immaterial and incompetent; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

A. Before there was any mill run made, a month or two, Cheatham asked me one day in the stope,

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at the same time pointing it out to me, if I had noticed it; and I told him I had; the remark was made by one of us—"it looks as if it had been put there." There was no one else present beside him and me. I saw Mr. Sigafus in the summer of 1894; he was in the front of the house I am living in. It was when I came home from work that I saw him. The last thing Sigafus said to me was "not to say anything."

Cross examination:

137 Q. At any time you had the conversation as testified by you with Mr. Cheatham was Mr. Sigafus, the defendant in this action, present?

A. No, sir.

Q. At any time that you received instructions from Mr. Cheatham concerning your work in or about the mine, was the defendant in this action, Mr. Sigafus, present?

A. No, sir.

Q. Did you ever talk with Mr. Sigafus about Cheatham's instructions?

A. I have never talked with Mr. Sigafus about any order or instruction that Cheatham gave me.

138 I knew of none of Mr. Sigafus's orders to Cheatham.

The ore that I sacked and broke, it was in what we call the old first level, in the stope near the second man-way, north of main shaft. That was not the only occasion while I was employed in the mine that the ore was sacked.

Q. Is it not a common occurrence?

A. I sacked a good deal of ore right through in that stope, and this was some I had left or overlooked. I had orders from Doran to put all of it in the chute.

Q. You say that these were some sacks that you had overlooked—how many sacks of ore were there in the first instance, sacked by you?

139

A. That I can't tell, because I had sacked some ore at least twice, and had sent it up in the sacks. It was rich ore. I could see gold in it—rich ore—and that is the reason it was sacked. I am not an assayer. I never made any examination or assays of this particular ore in order to see how much it would run to the ton.

Q. Did you pound up any of this particular ore in a mortar to ascertain how rich it was?

A. No, sir.

Q. I ask you to state to the Court how much this ore would run to the ton in gold?

140

A. $20 or over.

Q. You have stated that you have not the requisite knowledge to make an assay, and that you never made an assay of this particular ore, or panned any of it, or crushed it in the mortar, and still you swear the ore would run $20 and over to the ton—now, you were just guessing at that, were you not?

A. It is not exactly a guess; it is a proposition I would bet on.

Q. Then you will not swear it would go $20 or over per ton?

A. Of course, I could not swear to anything more than my judgment; no one else could do it, if they never panned any of it. I do not know, of my own knowledge, that the sacked ore was run through the mill during the Egan test.

141

Q. How much did this ore weigh to the sack—how many pounds?

A. As near as I can judge, 40 pounds. I had no means of weighing it; never even thought that it would come up. I never weighed any of the sacks to see what they weighed.

Q. You stated that Cheatham accused you of not taking the waste out on purpose—what did you mean by that?

A. I meant just what I said; he accused me of

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not taking the waste out on purpose. The waste is valueless. I have sent up as good ore, at different times before the Egan mill run, fully as good as I sent up then. I commenced work in the Good Hope Mine three years ago last December, and have worked ever since, except when I have been sick, or when the mine was shut down. I am a practical miner. I can't give the correct definition of a gold sulphuret. It is a sulphuret carrying gold, instead of gold sulphuret.

Q. Now, tell me what a sulphuret is.

143 A. As my understanding is, that it is an iron that is called sulphuret. I have not looked in the dictionary to get the exact definition; that is all I know about it.

Q. Now, Mr. Kingsbury, tell me what a concentrate is in reference to your answer to direct-interrogatory 35.

A. Concentrates is a mineral that has been concentrated—separated from the rock that carries it. That answer applies to the kind of concentrates to which I had reference in my answer.

Q. Where did you see those sulphurets and concentrates that you testified to?

144 A. I see it through the stope between the main shaft and the old shaft south; also north of the main shaft 40 or 50 feet, and on the level 500 feet north of main shaft, about 30 foot of it, along the ledge; all this is on the ledge, in between the hanging and the foot wall. I never seen it on any other level. Never assayed it, so can't tell that they carried gold.

A sulphuret may or may not carry gold. I won't swear that these sulphurets did. The concentrates I have testified to, in my belief and judgment, carried gold. I never assayed them. Cheatham asked me if I had noticed the concentrates. One of us, I don't know which, said, "It looks as if it were put on."

When Sigafus told me not to say anything, I said that I would not. 145

Q. When you said, in reply, "I would not," what did you have reference to?

A. I thought it was in relation to anything I knew in regard to the mine.

Q. Did you know anything, of your own knowledge, that was damaging to the mine?

A. As near as I knew, the mill-run was not what I call fair and square. Also, I knew of these concentrates and sulphurets.

Q. Did you ever have any talk with Mr. Sigafus concerning this Egan test? 146

A. No, sir.

Q. Is it not a general custom amongst all miners that they are not to speak to strangers concerning the mine or its workings?

A. The custom that way is the same as any employee in other business. During my work as a miner, during all these years, I was never cautioned but once, and that was here on this mine since the Good Hope Company bought out Mr. Sigafus. Graham, the superintendent, so called, cautioned me. As near as I can get at it, he said, "I wish you wouldn't talk about the mine." And I told him I wouldn't. 147

I have a family—a wife, one boy, and my sister-in-law. I live in one of the Company's houses. I don't pay any rent. I have lived in that house, without paying rent, since two years ago last September. Mr. Sigafus never charged me any rent. I also built an addition to that house. Mr. Sigafus is not the owner of the mine now. I was hurt in the mine; the Company pays my doctor's bills, I think. I know they paid other men's bills. The doctor has not presented any bill to me for services. He has asked me once in regard to the bill. He asked me if Mr. Wilson has said anything to me about it, and I told him no. Mr. Wilson, the super-

intendent, first spoke to me about taking my deposition. I said it was my opinion, as far as I knew, that it was not a fair and square deal. The ore that I broke for the Egan mill-run had been held in reserve ever since I worked there before. I can swear that the ore I broke and put in the chute after being re-sorted was put in the car and run out to the shaft. I seen some of it along on the track near the chute where it had been thrown by the carman; I seen two or three cars of it at the station on the level before it was sent up. I didn't
149 see it upon the surface. I know why it went into the mill, it was too rich to throw over the waste dump. I did not see it put into the mill. I didn't break any poor ore; this I broke for the Egan mill was just like a tit hanging down. I had broke some of that ore for previous mill-runs that was made when two experts came here, and Doran and I changed upon the experts some of the sacks that had been sacked and sewed by the experts and myself and another man to make that mill run rich, and, as I understand it, the experts got away with the clean-up.

Q. Then I understand that you substituted sacks
150 with good ore for bad ore and gave them to the experts at that time?

A. I did.

Q. You and Doran did this, did you?

A. Yes, sir.

Q. And when you and Doran did this you knew you were perpetrating a fraud upon them?

A. I did.

Q. How much were you paid for your work at that time?

A. $2.50 a day. I did it on orders from Doran.

Q. That—is that the James B. Doran who was at one time foreman of the Good Hope Mine, whose deposition was taken in this case about a month ago?

151

A. Yes, sir.

Q. Did those experts come to examine the mine with a view to purchasing the same?

A. That was their representations.

Q. Did not Doran bring them to the mine?

A. No, sir; Mr. Bird. Mr. Sigafus was not here.

MANUEL MILLER, by deposition, on behalf of the plaintiffs, testified as follows:

152 My residence is Good Hope Mine, age 44 years; occupation, a miner. I commenced to work at the Good Hope Mine in July, 1890. I have worked there most of the time ever since. I know James M. Sigafus. He paid the miners 1890, 1891, 1892, and 1893. There was a little mill here when I first came here. A Bryan mill was put up at the mine after I went to work. When I came here they milled the ore in the little mill. The ore mined between the time I went to work in 1890 and the time the Bryan mill was erected was piled close to the mill, and milled when Bryan mill was finished. I know John M. S. Egan. I saw him the first time he came to the mine. 153 I heard that they was going to make a little mill run for Egan. I was mining down in the mine. I know James R. Cheatham. He was mine boss at the time of the mill-run.

Q. If said Cheatham gave you any instructions or orders about your work during said mill-run, state fully what he said.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

A. He told me to put some ore that was sacked there in the chute. That ore was put in the stope

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close to the second manway on the first level. I put this ore in the chute. I didn't count the sacks; about a dozen, more or less; I can't tell. It seems to me it was good ore; whether it was very rich or not I can't tell; it was white and a little yellowish. I have been mining since 1876.

Cross-examination:

The ore milled in 1890 was milled by the Bryan mill; I don't know what year it was milled. I never assayed or panned out any of that ore in the
155 sacks. When I state it was good ore, I merely give it as my opinion, without making any assay or panning it. I worked in the mine underground during the most of the time it was run.

Q. Do you know this stope where those sacks of ore came from?

A. I don't know where it came from; I know where I got it. Mr. Wilson asked me to testify here. He is Mr. Wilson, the superintendent of the Good Hope Mine. I never spoke to him but once; one day Mr. Doran asked me if I knew of such sacks and if I knew who put them in the chute, so I told him I did. I talked to Mr. Jones about it.
156 I heard Mr. Jones was interested in the Good Hope Company. I live in one of the Company's houses with my family. I don't pay any rent.

WILLIAM J. COCKING, by deposition on behalf of the plaintiff, testified as follows:

My name is William J. Cocking; age, twenty; residence, Good Hope Mine; occupation, working in the mine. I commenced here in 1893. I have worked as a carman. A carman has to send up ore and waste; keep the chutes empty; keep his

track clean down in the mine; when he has nothing else to do he helps the miners. I know Mr. Egan. I first saw him here at the mine when he first came out from Colorado, the first time. I saw Mr. Sigafus at the Good Hope Mine the first time I ever saw him. I know James R. Cheatham. Mr. Sigafus hired me. Cheatham was foreman when I come and he worked for Mr. Sigafus. I remember when the Egan mill run was made. I run a car.

Q. Did Cheatham give you any instructions as to what you should do during said mill run? If so, state what he said in giving said instructions, and 158
if so, what you said at the same time.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

A. When I went down in the morning he told me not to send up anything until he came down; when he came down he took me around and showed me what chutes he wanted me to run out of, he told me to run out of all the chutes excepting one when Mr. Egan was down in the mine, and I done it. 159

Q. Which chute did he tell you not to send up from when Egan was there?

Objected to by defendant's counsel as incompetent and immaterial; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

A. The chute near the second manway on the first level on the north side of the main shaft.

Q. What directions did he give you regarding that chute?

Objected to by defendant's counsel as incompetent and immaterial; objection over-

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ruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. He told me it was "damned rich ore and he didn't want Egan to see it." I suppose he meant Egan; he said "them." (End of answer.) I sent up from said chute as much as four cars, I am sure; I sent up some on the first day and on the second; it was rich-looking ore for all I know about it; it was a red looking ore, with a little white in with it.

Q. Did Cheatham, at any time during said mill
161 run, after he had said to you what you have already testified to, have any further talk with you about the ore from said chute? If yea, state fully what that talk was—what he said and what you said.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. Yes, sir; he did; he came down and wanted to know if I had it all up, and I told him yes; he said,
162 "that was good," and that he was glad of it. (End of answer.) I had some of it in my car once when Egan was down in the mine, in the bottom of the car. He did not see this ore, because I had some other ore on top of it.

Q. During said mill run did you keep any account of the carloads of ore that you sent up? If yea, state when you began to keep the account and how you kept it.

Objected to by defendant's counsel as immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. Yes, sir; I kept it on a tally-board down in

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the mine. I kept it truly and correctly—accurately.

Q. If, at any time during said mill run, Cheatham had any talk with you about said account, state fully what he said and what you said, and all about it.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

164

A. Yes, sir, he did; he came down in the mine and wanted to know what in hell I was doing. I told him I was not doing anything but sending up ore and running the cars. He said I was sending up one car and marking down two. I told him I wasn't. Then we had a little quarrel over it down there.

Q. If Cheatham, at that time, did anything to your account that you kept on the tally-board of the carloads that you sent up, state fully what he did.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

165

A. Yes, sir, he did; he scratched off 15 marks from my tally-board.

Q. Who was hoist engineer at the mine during the mill run?

Same objection, ruling and exception.

A. Frank Whitten.

Q. If said Cheatham, before Egan came to the mine, and before the mill run was made, said anything about a purchaser coming to examine the mine, state fully what he said, how long before the

166 William J. Cocking.

said mill run that he said it, and where you and he were when he said it.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. Yes, sir; he told us there was a party coming here to see about buying the mine; that was one day at noon, when we were coming up the shaft—
167 about half-way up. It was a few days before Egan came.

Q. If, at the time referred to in the preceding interrogatory, he gave you any order or instructions as to working in the stopes or preparing the stopes for examination, state fully what he said.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. Yes, sir; he told us this party was coming
168 and to get our places fixed up nice, and we done it. Before Egan came to the mine we took all the loose waste down around from the ore; we cleaned up everything to make it look nice; all the boys in the mine were doing the same thing. Cheatham told us to. I could not tell just how long it was before the mill run.

Just a little while after Egan went back I was discharged. Cheatham fired me. Mr. Sigafus said if Cheatham discharged me I would have to go.

Cross-examination:

Mr. Sigafus was not present when Cheatham gave me instruction. Mr. Miller, Fred Watts,

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Johnnie Wilford, Frank Foster and, I forget the other one, were about there. Cheatham's position at that time was foreman at the mine. I received instructions from him as foreman before, and in the presence of others also before. He, at this time, did not enjoin any secrecy upon me nor upon any other person or persons present. The next instructions I got from Mr. Cheatham was down in the mine, about seven o'clock in the morning—somewhere near eight. He came and told me to come and he would show me what chutes to run it out of.

170

Prior to the Egan test I received instructions from Mr. Cheatham as to what chute I was to work in and as to what ore I was to send up. The instructions by Mr. Cheatham, in the presence of the seven persons, was not an unusual occurrence. There were three chutes. I don't know how rich the ore was. I have sent ore before out of that chute. I don't know whether it was rich ore or not.

Q. Have you stated all the conversations between you and Cheatham at the second time you received instructions from him during the Egan mill run?

A. No, sir.

171

Q. What further instructions did he give you at that time?

A. He told me that the ore in that chute was damned rich ore and he didn't want them to see it, and to slip it up when I got a chance. He said if he asks you where you are getting it from, and if I had any of that ore in the car, to tell him out of some other chute.

Q. Who was present at that time beside you and Cheatham?

A. Nobody. I slipped up out of that rich chute about four carloads of ore.

Q. Is it not a fact that you sent up out of the other chutes over 40 carloads?

172 A. I wouldn't say there were 40 carloads.

Q. Will you swear you didn't send up 40 carloads?

A. I have forgotten; I wouldn't swear that I did or I wouldn't swear that I didn't. When Cheatham marked the cars off my tally-board I told him then I had run the cars and I wanted them; he said I didn't run them and to keep still or I would go on top. After I was discharged I was never after employed by Mr. Cheatham or Mr. Sigafus. I told Sigafus I was discharged and asked him if Cheatham
173 could fire me. He said Cheatham was the foreman, and if Cheatham said I had to go I had to go. I worked under Mr. Cheatham for this Company. I told Egan about running that rich ore up on him, after I was discharged when I came back to work for him. Cheatham at that time was working for Egan. I told him Cheatham gave me the orders to do it. I didn't feel very good towards Cheatham for firing me without any reason. I said I would give him away when I was here last time and I done it. I told Egan, and he knew nothing about it as far as I know. I wanted to keep Cheatham out of work if I could. At that time he was work-
174 ing for Egan. I don't know whether Egan fired him or whether he quit. I said about Cheatham that if he and I had any more trouble we would fight it out; I said that before several. I used the words about Bev Boran. I got him fired. Mr. Willson first spoke to me about giving my deposition in this case. He called me in the office and asked me if I knew anything about it, and as I knew he did, I told him I did. That was quite a little while before Mr. Jones came out here. It might be two months or more. At the time I promised to testify I was employed by the company for whom the said Willson was superintendent. I said nothing about what I would testify. I have discussed the matters I have testified

to with others connected with the mine. I live at the Good Hope Mine, with my uncle, Fred Watts. I have been employed by the present company since April or May, 1894, and have been working for them ever since until laid off the other day. My uncle, Fred Watts, with whom I live, lives in one of the Company's houses. I don't think he pays any rent. 175

Q. Did you ever have any instructions prior to the Egan test about cleaning up?

A. Yes, sir; Mr. Cheatham used to tell us every once in awhile to clean up our track and station and make them look neat. 176

FRANK A. WHITTEN, by deposition, on behalf of plaintiffs, testified as follows:

I am thirty years old; reside at Good Hope Mine; occupation, hoisting engineer. I know James M. Sigafus. I first went to work for him in September or October, 1890, and except from the 13th day of August, 1891, to some time in March, 1892, I worked for him until he sold the mine. When I went there there was no mill running. The Byran mill was put in afterwards, as near as I can tell, in 1892; when it was put in there were two piles of ore on the surface. They were mining but not milling in 1891. In 1892 they were mining and milling at the mine. I know John M. S. Egan. I first saw him here at the mine either November or December, 1893. There was a mill run after I first saw him here—a week or so. I was hoisting engineer. I hoisted the ore and run it into the mill myself, and also kept tally of the number of cars. I kept tally on a cardboard with a pencil. Mr. Cheatham supplied them. I kept the account correctly. Mr. Cheatham took care of the cardboard. 177

Q. Did you have any conversation with Mr.

178 Cheatham during the mill run about your account and the number of cars of ore that came up? If so, state it.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. He said my tally wasn't right; that it didn't tally with the boys below. (End of answer.)

Cocking and Boren kept the tally below; I didn't see them. They were the carmen.

179 Q. If during the mill run Cheatham changed any of your tally-boards, state what change he made.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. There was a change made by Mr. Cheatham. He said I had too many cars. I don't remember how many he took off. The ore was taken in an iron car on a track; I run it myself.

Q. What instructions, if any, did Cheatham give you during the mill run as to what you should do 180 during the mill run? State fully what he said in giving said instructions to you and what you said.

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. Yes, sir; he told me to keep the skip cleaned out; Mr. Sigafus told me when Cheatham was present to keep the ore cleaned up on the platform where it had spilled off the car. (End of answer.)

All that I notied about the ore was the cars came up loaded full, and it was what was called rich ore, and no waste in it; the rich ore I spoke of was red

ore; I panned it several times and it was considered the best ore in the mine; I could see gold in it. It was all clean and free from waste; the cars were loaded fuller than usual, and it was apparently all good ore all the way through; a good deal better than any average we had had before. There is always a considerable waste as a rule; I don't know just how much. There were to be sixty-one cars in that mill run; but how many there was run I couldn't say; whether there was more or not; I am sure there was sixty-one. 181

Q. How did you know when to stop hoisting that ore for the mill run? 182

A. Cheatham told me that was all they wanted for that test.

Q. How many carloads of ore, loaded as they were during this test, would make a ton?

Objected to by defendant's counsel as incompetent and immaterial; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. I would judge that 2½ cars would make a ton. (End of answer.) 183

During the test I saw Sigafus panning at the hoist a good many times and saw him at the mill several times. The crushing room was above the mill. There was nothing to prevent a man coming into the crushing room without my seeing him during the mill test. The mill made considerable noise; it would drown out the footstep in the crushing room easily.

Q. Describe the way and manner in which Sigafus opened up the stopes in said mine and the way he developed said mine?

A. All that I know about the way Sigafus opened the stopes is that when the stopes would run to where the ore was good and wide he would stop.

184 Frank A. Whitten.

I know James B. Doran. During this mill run he lived up stairs in this house.

Cross-examination:

About 16 or 17 men were employed at the time the Bryan mill was running. The mill at that time was run to its full capacity. Mr Cheatham took charge of my account; that was his business as foreman of the mine. He always took charge of it at the end of the month. But the Egan test
185 didn't run a month. It only ran two and a-half days. This supplying me with the cardboard to keep the tally during the Egan test wasn't an unusual circumstance. Cocking and Boren kept their tallies below; I didn't see them keep their tallies. I didn't know and cannot testify that he ever changed my tally at all, and my only knowledge upon that fact is contained in my answer to the question last preceding. I say Cheatham changed my tally, but how many he took off I don't know. He didn't remove and obliterate any tallies in my presence while I was there. If he removed those tallies they were removed when I was not present. He told me he would straighten it up, and I went out
186 to throw some coal on the fire, and then I had to go and run the car at the mill, and when I came back the tally board had been straightened up; Jim said it was all right now, but just how many he had taken off I don't know. I did not see him take any tallies off. There was a change made by Mr. Cheatham; he said I had too many cars; I don't remember how many he took off. He was the only man who had anything to do with the board at said times, and when I came back there was a number of them scratched off, but I don't know how many, and also that Cheatham told me it was all right. I am not an expert in panning ore. I cannot tell the richness of ore by simply looking at it. I

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couldn't tell you how often I have panned ore. My duties was to hoist, run the cars, fire the boilers and tram the dirt. Panning ore was not part of the duties that I was to render my employer. I have substantially but little knowledge of mining. I don't know that all red ore is rich; I know that this ore I am speaking of is rich ore from what I had panned and seen panned; I have taken a handful of fine dirt from the box I keep samples in of this rich—of this red ore, and put it in the pan without putting it in the mortar, and got dozens of colors out of it—that is, gold. It is a fact that 188
rock may show gold, and still not run $10 to the ton. It was not an unusual occurrence for Mr. Sigafus to be in and about the mill during the Egan test or at any other time. I will not swear positively that I saw James B. Doran at the mill at any time during what was known as the Egan run. I first spoke to Mr. Willson and Mr. Jones concerning the matters and things I have testified to in this action since the Egan test.

———

ALBERT L. JEPSON, called as a witness on behalf 189
of plaintiff, testified as follows:

I live at the Good Hope Mine, Riverside County, California. I have been there steady for about a year. I worked there five years and a little over; beginning in 1891 up until they shut down on the 1st of March, 1896. My regular business has been running a mill there at the mine for the last four years. I never mined a day in my life. I did anything I could get to do before that. I never worked in other mining mills at other mining properties. I was in Mr. Sigafus's employ for three years; up to the time that he sold out in November or December, 1893. I had not been in entire charge of

the working of the mill. From 1891 Ed. Manker and myself and a man by the name of Wiltsie were at work there in charge of the mill besides myself. I worked there steadily the whole of that time. The Bryan mill was put in there the last of January, 1891, or the first of February. Mr. Sigafus himself was there about two years, between January, 1891, and December, 1893, I think. He was away one summer, nearly all summer. I don't know which he called his home, here or there. The biggest part of the time after that Mr. Sigafus
191 spent at the mine. His wife lived there with him. They lived in a house that was built for them up on the hill above the mine. The mill would run, if in good repair, ten tons in twelve hours anyhow. Manker and myself run it eighteen hours for something like two months. That was in 1891. I begin running eighteen hours on the 19th of August, 1891. It kept up something like two months.

Q. From day to day?

A. Yes, sir; I do not know what quantities of gold were taken out there. While I attended to the mill myself I knew pretty near what it run. The value of the ore that ran
192 through that mill after I run the mill myself, I think, would average about $8. This was in 1892 and 1893. In 1891 there was so much of the time I didn't run it. The richest ore, I think, that I run through at that time, was somewhere in the neighborhood of $20. Mr. Cheatham was the foreman of the mine during Sigafus's ownership, after Doran was taken ill. It was some time during the summer, I think. I would not want to say what month it was. I was there when Col. Egan came to make his test or examination of the mine. Sigafus was there. I remember the mill run that was made for Egan. It took a part of three days, as near as I can recollect. It might have run seven hours the first day, and might have run eight. The

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bin was empty and we waited on that account. We did not begin early on the very morning of the first day. The next two days we ran twelve hours, until they were out. I think we stopped before the third day was out quite. We ran the whole of the second day. The run straight through it was as good as any they ever had. There was times it was better.

Q. Did you notice any times when there was any marked difference?

A. Yes, there was twice.

Q. On which day was the first of those times?

194

A. The second day and the third day.

Q. State to the jury exactly what you saw yourself on the second day as to the quality of the ore that ran through the mill.

A. Maybe I'd better explain something about amalgamating, so that I can make them understand.

Q. Tell them in your own way just what you saw.

A. Ore in being ground, you have got to feed quicksilver into the battery once an hour. That is the way we feed it. Then there are plates that it washes over, and a little gold is washed out, and that catches on these plates of quicksilver. You watch them—turn the hose on, with clean water, and watch them; try it with your finger to see if it is getting hard or soft. If it is getting hard, feed more quicksilver; if it is getting soft, don't feed as much. During the second day I noticed the plates were getting hard, and I had to add nearly three times as much quicksilver, for about two hours, as would be usual. That would indicate that the ore was about three times as rich; three times the average richness. I noticed it again the third day, and it was worse than it was before. I fed five or six times as much quicksilver for about three hours. Instead of putting it in once an hour, I put it in

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about every 15 or 20 minutes. The plates were growing hard, and I went around the mill and poured it in, so that it slopped out. That didn't do any good, and I took a spoon and threw some on the plates. That was not a usual thing. It never happened before. We don't have to use quicksilver; only after we clean off, we put quicksilver on them and dress them up with a brush broom and make them all even, like a looking-glass—more quicksilver indicates that there is richer ore.

197 *By the Court:*

Q. Where is this put?

A. It is put into the mill to grind in with the rock. When we clean the plates off perfectly clean, and then they are dressed up again, we put quicksilver on them then. While the mill is running we feed it through the mill, through the battery. This very rich ore on the second day continued about three hours. That is wrong. The second day's run was about two hours and the third day's run was about three hours. The first of the two days, when I noticed this remarkable ore, the
198 value was from $25 to $30 ore. On the last day it got, in my judgment, anyhow, $100. Mr. Sigafus was about there during that time. He was through there several different times. He spoke to me three times about the run. The first time he told me to crowd the mill, and make it help sell the mine, after we had started a while he told me to never mind crowding the mill, but be sure and get all the stuff. He meant gold. The next time he came in he asked me if I was feeding any quick (quicksilver) now. I don't remember what I said to him at that time. That was the second day. The third day he came in the same way that he did the second day, and asked me if I was feeding any quick. That was the time it was coming so strong

in rich ore. I told him yes, I was throwing it in by the spoonful, and if it didn't quit coming in that way pretty soon, I was going to throw the bowl and all in. He laughed, and went out the door and went off. During the whole of those three days he was in and out. After the mine was sold, I run the mill up until about the middle of May. I never see any such ore go through the mill afterwards or before; not like that was at that time; nor anything to compare with it. I mean the time that it took these spells, that I would be throwing quicksilver in so much; these spasms.

Cross-examination by Mr. Johnson:

I don't think I have stated anything here that I did not know. When I commenced to work at this mine, I had never had any experience in mining or milling. I am here for the Good Hope Company, I suppose. Two months that I said we worked 18 hours a day at the mill started the 19th of August, 1891. Manker was the chief mill man up to August 19, 1891, I guess.

Q. How long had you been working in the mill at that time?

A. I commenced there and helped about the mill in January.

Q. How long had you been working in the mill at that time, on the 19th of August?

A. I helped put the mill up in January, 1891. I was nothing but a helper there; in March, 1891, I worked on the ore. I had no experience in milling in March, 1891. I did not have any experience as a mill man in April, 1891, nor until August. The mill run 18 hours in August. I didn't run it. I went home at 6 o'clock. The screens on this mill are about eight inches; I wouldn't say exactly. Eight inches wide and three feet long. These are the places where the pulverized rock is thrown out. The mill will

crush more with a twenty-six mesh than with a forty mesh. Fifty-five mesh is so fine that water will hardly get through, everything clogs right up. They would not crush so much. There was some screens in this mill called sixty. It was just like a milk strainer. Mr. Sigafus was away from the mine in 1891, I think. I estimate the average richness of ore that ran through the mills by the amount of quicksilver that I fed into it. An ounce of quicksilver will amalgamate an ounce of gold. Gold, in the rock, and the quicksilver will rub
203 together just the same as sand and water, and you can keep adding gold to it and it will get harder, just as mortar will, and dry up, and you have to chip it off sometimes, it gets that hard.

By Mr. Johnson:

The gold metal in the ore and the quicksilver unite to form an amalgam?

Witness: If you get it hard it will be half and half very near. It takes an ounce of quicksilver to amalgamate with an ounce of this metal. It takes more in winter than in summer.

204 A good deal more.

Q. Does it require more than this amount of quicksilver to be thrown into the mill to reduce the gold?

A. When?

Q. In the mill.

A. Cause more to be thrown in?

Q. Does it require more in practical milling than an ounce to an ounce?

A. At what time?

Q. At any time during the mill run, or any mill run.

A. I don't understand you. I don't know how you mean by that.

Q. You testified that you determined the amount

of gold that came through this mill by the amount of quicksilver that you threw in it?

A. Yes, sir.

Q. How much for an ounce of the gold that comes out of the mill does it require of quicksilver to be thrown in?

A. If you have thrown in an ounce you ought to have two ounces of amalgam, good and hard.

Q. So that if you threw in twenty ounces of quicksilver into the mill in the course of a day, or a longer time, how much gold do you determine by that ran through the mill during that time? 206

A. We could get forty ounces of amalgam.

Q. How much gold in it?

A. It ought to be twenty ounces if it is good and clean. The quicksilver we ordinarily use in one day is according to what the rock is. I have run days that I did not use more than two or three ounces all day and another day I would use that many pounds. I don't know as I could tell just the average.

Q. If any day you used ten ounces of quicksilver in the mill, how much gold would you judge ran through the mill that day?

A. I would count that I had got ten ounces of gold? 207

Q. It was by that method that you computed how much the gold that ran through this mill would run to the ton?

A. Yes, that is all the way you have got to do it, until it is cleaned up and weighed. They know; I don't. At that one time that I spoke of, of the ore coming in rich, I used a couple of pounds in that many hours, pretty near. The finely pulverized ore is thrown out of the mill through these screens and lands in a trough which goes over some plates; copper plates with silver, and then quicksilver on them. When we commenced this mill run we cleaned those plates, everything was cleaned up, and

208 Albert L. Jepson.

applied quicksilver to the plates. It is the intention to keep quicksilver on those plates during any mill run sufficiently soft so that the gold will catch on; just keep it in a kind of dough. Ordinarily we did not put quicksilver on those plates during the day.

Q. Do you testify that you never did so?

A. I never put it on only after they were cleaned up, after starting up, while it was running.

Q. When was that?

A. In the morning sometimes when it was cold,
209 before starting I would put a little along the head of the plates, right up at the top, and when it was running after starting up——

Q. Will you testify as to what your custom was the first thing in the morning of each day about applying quicksilver to the plate?

A. They always had to be rubbed up every six hours. In the morning, after they had stood all night, and this gold with the amalgam would be too hard, I would put quicksilver on sometimes; sometimes not.

Q. That was your ordinary custom, was it not?

A. If it needed it; if it did not need it I did
210 not put it on.

Q. At the end of six hours from that time, what would you do?

A. Just stopped the mill and took a brush broom and rubbed it all up; brightened it all up.

Q. Did you put any quicksilver on then?

A. No.

Q. Do you testify that you never sprinkled quicksilver on the plates at any other time than during the mill run?

A. I put it on when I started up in the morning.

Q. No other time?

A. If the plates were cleaned at noon I would put it on. We generally clean the plates at the noon

hour. if there was anything on them to clean off. Sometimes I didn't clean them for a week.

Q. So that ordinarily you put it on twice a day, didn't you?

A. No. That is what we had to watch the plates for, to keep them just so—to feed the quicksilver through the battery.

Q. You have made your computation. Will you state which ounce you used, troy or avoirdupois?

A. I would guess at an ounce of quicksilver, the same as you would guess at anything.

Q. Which kind of ounce are you speak of, of gold 212
—troy or avoirdupois?

A. We would take Mr. Sigafus's scales. He had the common scales that they have in candy stores.

Q. You used the ounces which those scales showed?

A. Yes. They didn't have any ounces that I saw. He had chunks of iron on there. I don't know what they weighed.

Q. In speaking of quicksilver what ounce do you use—troy or avoirdupois?

A. I don't know which it is weighed by.

Q. Do you mean the ounces as it comes in the can—weighed by the ounces that it is weighed by 213
in the can? How did you determine this? You said that you determined the amount of gold that ran through this mill by taking an ounce of gold to an ounce of mercury?

A. Yes.

Q. Now, what ounce of mercury did you take—troy or avoirdupois?

A. I judged that; I didn't weigh it.

Q. How much in size is an ounce of mercury?

A. If you have got some I can pour you out about an ounce—if you have got some and want me to try it.

Q. Will you describe the process of cleaning up the mill?

214 Albert L. Jepson.

A. The mill has dies in the bottom for wheels to run. We would clean the pulp out and take the keys out from these dies, and take them all out and clean everything out that was inside of it and put it back.

Q. And when you so clean that out you have a mass of pulverized waste and amalgam and sand, haven't you?

A. Yes.

Q. How do you take the amalgam out of that?

A. We have to wash it out with pans.

215 Q. Is there such a process as squeezing amalgam?

A. We have to grind it and pulverize all the hard lumps of amalgam and put more quicksilver in and grind it until it is all soft.

Q. When you cleaned the mill was all the quicksilver amalgamated with gold?

A. All of it was more or less amalgamated with gold; some might be thin.

Q. Did you use any means to take away the quicksilver that was not amalgamated, in cleaning up?

A. It was all put in together. All has to go through the wash, hard and soft. I don't know

216 what day of the week the Egan Mill test commenced.

Q. How much quicksilver did you put in the mill during the Egan run?

A. I don't know as I could say what I did put in.

Q. You cannot form any idea of how much, in bulk, you put in?

A. No, not altogether. I got the stuff as I fed it, and I thought nothing about it at the time.

John M. S. Egan.

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JOHN M. S. EGAN, by deposition, on behalf of plaintiffs, testified as follows:

Defendant's counsel objects to the deposition as immaterial and incompetent and not connected with the defendant. That there is no evidence in the case that Egan represented the plaintiffs, or that there existed, at that time, between Egan and the plaintiffs any engagement or even a knowledge of each other.

Objection overruled. To which ruling of the Court counsel for defendant then and 218
there duly excepted.

Age 45, resides at Perris, Riverside County, California. Occupation, miner. I know John L. Hobson, Dudley Porter, C. W. Morse and James M. Sigafus. I have known James M. Sigafus about 21 months in California. I met him on the 16th or 17th of November, 1893, at the Good Hope Mine, introduced by W. H. Griffith. The circumstances of my first visit to the Good Hope Mine, when I was introduced to Mr. Sigafus as the owner of the property, and myself as a mining man, who had come down to examine the property, with a view of 219
its purchase, in the interests of Mr. Morse and his friends, and some of my friends. Mr. Morse directed me to make the examination for the purpose of verifying a certain mining report known as the "Burnham." The Burnham report (Plaintiffs' Exhibit A) was sent to me by mail to my office in Georgetown, Colorado, in the latter part of September or early in October, 1893, with several other reports of other mines. It was sent by James H. Platt from Chicago. Mr. Platt was also interested in paper mills and other industries in Denver, and we had been interested together in mining some 12 or 13 years. The paper shown me is a copy of the Burnham report that was sent to me with a num-

220 John M. S. Egan.

ber of photographs and maps to Georgetown, Colorado.

Q. When you say "copy" do you mean you ever saw any other "original" than the paper now in your hands?

A. No, sir.

Q. Is not that the identical report you received by mail, as first stated?

A. It is.

Paper handed to witness, marked A for identification by notary, copy to be certified
221 and attached to deposition.

Immediately on my arrival the afternoon of the 16th or 17th of November, 1893, I began my examination of the mine under the instructions I have mentioned. That examination continued until the 25th of same month. As far as I could tell Mr. Sigafus was on the premises during the whole of that examination. I saw him so often, that at this distance of time, it's impossible to particularly note each occasion; but I saw him around the mine, office, mill, house or the grounds surrounding, every day, to the best of my recollection. Relatively, the
222 house, office and mill formed the three corners of an equilaetral triangle. The sides of which were about 300 feet. The mill, perhaps, being a little closer to the office. On starting to make the underground examination I requested Mr. Sigafus to go into the mine with me and stay with me during that examination. He went down the mine with me, but did not stay very long, giving as an excuse that he had a bad cold, and portions of the mine were very hot and others very wet. I walked over the surface ground covering surface openings in the vein, and got the idea of the course and distances as far as possible. Mr. Sigafus pointed out the boundary line of the section of land within which the mining claims were contained.

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I also asked Mr. Sigafus for his working maps of the mine. He replied that he had none; that he had never had the underground workings surveyed. Either then or during the next day he drew a rough sketch map on a large sheet of paper, giving the depths of the shafts, length of levels and the underground workings, which figures I copied into my note-book for reference during my examination. I said to defendant that I was making the examination for the persons who had been associated in mining with me—Mr. C. W. Morse and some of his friends. Mr. Morse had intended coming with me, but the death 224
of his father prevented. I said the purpose of the examination was to verify the report called the Burnham report that had been called to my attention, and, if the examination was satisfactory, we would probably purchase the mine. I used the sketch-map to copy the figures in my note-book. I do not know what became of it after that. I did not keep it. I don't know whether Sigafus kept it. To the best of my recollection, I last saw it at the mine office in the adobe building. It was in Mr. Sigafus's possession, as far as I know. As to the words on the paper I am not positive, but as to the figures I am. This paper which I have now drawn 225
is a full and accurate reproduction of that sketch or map drawn by Mr. Sigafus at that time, to the best of my recollection.

Drawing marked B to be certified by notary and annexed to commission.

Mr. Sigafus gave me an oral explanation of that sketch or map. He stated that the total depth of the main shaft was 416 feet, and that the first 250 feet had been sunk on the hanging wall, but that at that point the drift had been driven north about 700 feet and south about 250 feet to its intersection with the south shaft. Parallel levels had been driven at points 100 feet down the shaft; that the

south shaft had been sunk about 40 feet below the lower level south, making its total depth about 395 feet. Below the lower level the main shaft was sunk about 66 feet, and used as a sump. In connection with this map, south of the main available workings of the mine, he did not say that any had been carried further than were shown. He spoke of and pointed out to me the old caved and abandoned works in connection with this map. He gave me to understand, or stated, that this sketch gave the full extent of the main openings of the mine. He
227 said that the first level north was being driven ahead, but not the second level, where they were putting up a raise to connect with blind drift that ran from the stope in that level. I had heard of Mr. Sigafus in Colorado. From his description of his operations in Arizona and New Mexico, besides the evidence at the Good Hope Mine, I considered Mr. Sigafus a competent mining man. At the collar of the shaft he introduced me to James R. Cheatham as the man who had formerly been timber-man, but, owing to the illness of Doran, had been acting for the last two or three months as foreman of the mine, and was now occupying that position. During our conversation at the first
228 level, when Mr. Sigafus declined to accompany me in making my examination, in Cheatham's presence he told me that he (Cheatham) would go with me and explain every detail of the property, and give me every assistance in his power—in fact, placed Cheatham's services at my discretion. This was said in Mr. Cheatham's presence. This was before I had begun my exploration of the mine. I commenced the practical part of it as soon as Mr. Sigafus went on the surface. To the best of my recollection Mr. Sigafus went through the first level with me. I next went down in the skip to the second level. Cheatham and Griffith were with me, and I don't recollect now whether Sigafus was

or not. We were simply walking through to look over the mine and plan out my work. I went back to the first level and proceeded to measure the distances between the mill holes and manways, and the aggregate measurements of the first level north gave about 700 feet. Those measurements were made with a tape line or rule. After taking the measurements I started at the first stope near the shaft, measured its height and length between mill holes, and, at every ten feet or so, measured the width of the ore body, and taking samples when I thought it judicious to do so. This was on the first 230
level north. I went through the same method of examination as on the first level south. I started at the shaft, and measured from mill hole to mill hole, and measured the height of the stopes above the level, and measured the ore body, about every ten feet, where practicable, and took samples on both levels. In fact, I went through the same operation on all of them. I asked Cheatham if the pile of debris at the end of the drift, in the second level north, was up against the breast? He answered that the drift might have been driven five or six feet further, but that that portion of the drift had been driven whilst he had been at work on a 231
neighboring mine. He stated that these main levels only extended as far as the south shaft. This seemed to be true. In fact, the south end of the south shaft was boarded up. I also measured along the bottom of the second level, north and south, where practicable, and took samples; also examined the main shaft below this level as far as possible. In conversation Mr. Sigafus gave me the same figures orally as he had marked on the sketch map, namely, about 700 feet north and 250 feet south for each level. The pile of waste was at the very end of the drift, as apparent then. They were putting up a raise to connect with a blind drift driven from the stope. The waste from this raise fell in a heap

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at the bottom of the raise, hence it looked natural for the pile of debris to be where it was.

57 Q. Explain what you mean by a raise.

A. A raise is an opening carried up from the bank of a drift, either to connect it with the workings above, or for aid or for convenience of working, or for prospecting ground without stopping it out.

58 Q. What, if any, is the distinction between a drift and a level?

A. A level is a drift that is always kept open,
233 well timbered and equipped, and is really one of the main arteries of the mine. Whereas between levels a drift may be run for prospecting or ventilating ground and yet not be kept open.

After the purchase was complete I was in charge of the mine. I worked it. From the first of January, 1894, to the middle of December the same year. I found that, commencing about eight feet above the bottom of the second level south, the drift had been run south from the south shaft about 150 feet. In August, 1894, I instructed the foreman to have the dirt cleaned away from the breast of the second level north. After doing so, we found the drift had been driven 80 feet further than was ap-
234 parent in my examination and stated to me. The drift in the second level had been driven about 150 feet further than Sigafus's sketch showed, south and about 80 feet further north in all the drift had been driven. About 225 or 230 feet further than stated by Sigafus and Cheatham. At that time Sigafus had owned and operated that mine, according to his own statement to me, I should imagine from three to four years. At the breast of the north drift there was no ore whatever, only a streak of rotten granite that had evidently ran off the vein as we found afterward. As compared with the rest of the mine it was barren. At the south end the vein, or what little sign there was of it, was

split up and deflected about 30 degrees and is in hard, tight granite, and so compared with the rest of the mine, is barren. In the north drift it was simply a case of a mistake in judgment in losing the vein. In the south drift it showed the termination of the ore body disclosed in the workings between the main and south shaft, and it was also evident that a great deal of expensive prospecting would have to be done before another ore body could be found. In fact it looked as if the vein had split up, never to come together again. If it had so split up, would be of no value thereafter for 236
working. By ore in sight is meant ore that has been measured and sampled on one or two sides. It is considered of great importance in determining prospective value of a mine and whether it will pay to develop such ground into ore reserves. Ore in reserve is ore that is blocked out and that can be measured and sampled on all or nearly all sides. I had been mining about 23 years, and had been managing, operating and purchasing since 1880.

Q. Then, in your opinion and judgment, what was the difference in value of that mine as indicated by what you saw on that second level compared with the value you would have attached to it 237
if you had seen the concealed portions of that level?

A. It is a hard question to answer, but I would have made no further examination with the idea of purchasing. I would not have advised its purchase. The measurements I took varied from two inches to several feet, but as there was about 200 measurements taken I cannot, without my note-book, give each measurement in detail, about 24 inches was the average. My recollection is accurate as to that average.

Q. After the whole interior had been exposed, when you were working the mine, what did you find the facts to be as to the average width of the ore?

A. About 18 inches. My examination of the in-

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terior of the mine with Mr. Cheatham continued three or four days. I took about 24 samples in sacks for assay, beside others that I put into my valise, and a number of others were panned on the surface. Those were new canvas sacks especially for the purpose.

Q. How did you collect these samples?

A. Whenever I decided to take a sample I picked into a pan held either by Cheatham or myself, an average sample of the vein filling. When this was not practicable we laid canvas sacks and sacking on
239 the ground and broke down the quartz with large or small hammers as the case required. These samples varied in size that were cut down so as to make sample sacks full.

Q. What do you mean by cutting down samples?

A. The larger pieces were broken so they could be thoroughly mixed. The whole mass was then laid on the sacks and flattened out evenly; it was then divided into four quarters. Two alternate quarters were then thrown out; what was left was again flattened out, requartered and the same process gone through until two of the quarters were small enough to fill the sacks.

240 Q. What was the result of this process of quartering and cutting down?

A. As far as possible, it gave a fair average of the sample taken.

I took such of the vein filling as I thought would be handled in a large mill. Vein filling is quartz and other matter contained within the walls of the vein. The samples that I took, in my judgment, fairly represented the product of the mine, as then exposed to my examination. I did not take any samples from the parts of the mine that had been worked but was then concealed. There were about 24 bags. I left those bags of samples in Mr. Sigafus's office near the mine. Mr. Sigafus gave me a key for my use during my examination. I did not

then know that Sigafus kept another key. Each time I came out of the shaft I placed the samples taken in the office, so that some of them were there five or six days, others two or three days. The bags were fastened with strings that had been sewn on the side of the sack. They were not sealed. I sent them by express to Frank Graham, a competent assayor at Georgetown, Col. The result of the assay, leaving out the richest ores, gave an average ef $23 per ton. Before sending them to Graham I dried them, crushed them, ground them down, and sent them to Graham. I don't think I ever told 242
Mr. Sigafus the result of Graham's assay, but I may have done so by letter.

Q. Did Mr. Sigafus, to your knowledge, take any of those samples, or portions of them, either from the mine or office?

A. No, sir.

I left the residue of my samples in a large iron pan in the office, from which he proposed to take a sample and assay it himself. A mill run was made of the ore during my examination.

105 Q. Within your knowledge, what did Mr. Sigafus have to do with that mill run?

A. I saw him thoroughly clean out the mill and 243
clean up the plates before making the mill run—and after the mill run I saw he and Jepson clean out the mill, clean up the plates, wash the amalgam, retort it and weigh it.

We had several conversations about it. He asked me if I wanted two or three hundred tons run. I told him I would like to, but that I would only have time to run about twenty or thirty. I requested him to have his mill men or some one take samples of the crude ore and tailings every alternate hour. To the best of my recollection, every hour and at the automatic ore feeder. I directed the mill run to be made. I made the arrangements for a mill run with Mr. Sigafus

and with his foreman, J. R. Cheatham. The amount of ore was to be sixty-one cars, which we decided would be about equivalent to twenty tons, and that the ore should be taken from all portions of the mine, in the manner they were then taking. I cannot say positively how much of the time Mr. Sigafus was present during the mill run, but he was around the vicinity of the mine and office and house all the time. The mill run took three and a half days. Tally cards were furnished by Cheatham to each of the trammers on the two levels,
245 and another one to the engineer on top to keep tally of the cars sent up. The ore after being broken was thrown into chutes, whence it was trammed to the shaft and emptied into the skip, each car being supposed to make a skip load. It was then hoisted to the surface, automatically dumped into another car, and run to the mill floor. The car was then dumped into a grizzly or iron screen. What went through the screen fell through into the ore bin. What failed to go through was crushed in a small crusher and fell into the ore bin, whence it was fed to the Bryan Mill by an automatic feeder. At this point water is added to the ore, and the ore ground and pulverized by revolving
246 wheels, until sufficiently fine to pass through the screens, whence it ran over amalgam plates, and where the gold not caught up by quicksilver inside the mill was supposed to be saved. Cheatham supplied tally boards; gave directions to the miners and to men on the surface. It was arranged that 61 cars be brought up; Sigafus and Jepson cleaned the mill. I saw it retorted and weighed. The result was 51 ounces in gold. That was from 20 tons of ore stated by Cheatham and Sigafus. Both said 20 tons were sent up. I could not be present much of the time. Was crushing and drying samples. Going into the mine around the mill and one after-

noon Mr. Sigafus and I went over the surface again.

126 Q. Did you know Doran who had been superintendent of the mine, and did you meet him during the examination?

A. At my request I was introduced to him by Mr. Sigafus in his house. I afterwards met him on the dump of the main shaft where we talked together, he and Mr. Sigafus and myself. I also met him again on bidding him good bye when I was going away.

127 Q. Did you believe at that time that the 248
quantity of ore run through the mill was 61 car loads, 20 tons as stated to you by Sigafus and Cheatham?

A. I did.

128 Q. Did you believe that the ore then run through was a fair specimen of the ore then taken out of the mine?

A. I did.

129 Q. Were you aware of any tampering or any improper practices with that ore at the time?

A. I was not.

Q. What conversation, if any, did you have with Sigafus as to the Burnham report? 249

Defendant's counsel objects to this interrogatory on the ground that there is no evidence thus far introduced in the case as to what the Burnham report was, and the original Burnham report said to have been made some years back is not produced or proven.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. At this distance of time I cannot recollect all our conversation regarding this report, especially as they were carried on at different intervals dur-

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ing my visit to the Good Hope Mine; but regarding this man Burnham, he showed me some photographs he had in his desk, and told me that Burnham was a mining engineer who had visited the mine at different intervals during one year or more, sometimes two weeks or a month at a time; that he had most thoroughly examined the property and was familiar with it. With regard to figures giving bullion product, he said that they were correct, and that the books were in the possession of his son-in-law, Mr. J. Everett Bird. I
251 asked him about a great many details of the report, especially regarding the tonnage of 1891, and title to the claims—the Iron Ledge, and several claims lying near the east boundary of the section, the probability of the mine keeping on that depth, etc., the porphyry dyke, and other matters contained in the report.

Q. Did you ask Mr. Sigafus about the product of the mine in the year 1891, stated in the report at $57,000, at a cost of $15,000?

Objected to by defendant's counsel as incompetent and immaterial, and on the grounds that it is not connected with the
252 plaintiffs, and there is no evidence that Egan represented the plaintiffs or that there was any engagement between them or knowledge of each other.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. As stated in my previous answer, I did; and he said the sales of bullion as carried out were correct.

Q. Did Mr. Sigafus tell you how long the mine had been worked? If so, what did he tell you on that point?

Same objection, ruling and exception.

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A. As Mr. Sigafus and I had become very well acquainted with the history of the mine and his own personal history was so mixed up with it, but from it all I gathered that he had it about three years.

Q. What, if anything, did he say as to the average value of the ore he had taken out himself and the time during which he had taken it out?

Objected to by defendant's counsel as incompetent and immaterial, and on the grounds that it is not connected with the plaintiffs, and there is no evidence that Egan represented the plaintiffs, or that there was any engagement between them or knowledge of each other.

254

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. He told me that up to the mill run of July, August, September and October of 1893, his average value had been $20 per ton of ore milled; that he had not milled much up to the erection of the Bryan Mill.

Q. Do you mean that he had not milled much or had not taken out much?

255

Objected to by defendant's counsel as incompetent and immaterial, and on the grounds that it is not connected with the plaintiffs, and there is no evidence that Egan represented the plaintiffs, or that there was any engagement between them or knowledge of each other.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. That he had not milled much.

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Q. When did he say he had put in the Bryan Mill?

Objected to by defendant's counsel as incompetent and immaterial, and on the grounds that it is not connected with the plaintiffs, and there is no evidence that Egan represented the plaintiffs or that there was any engagement between them or knowledge of each other.

Objection overruled. To which ruling of the Court counsel for defendant then and
257 there duly excepted.

A. I think in 1891—I want to refresh my memory from the Burnham report. I cannot find it in the Burnham report, but I think it was in 1891.

Q. Did Sigafus show you any reports of the product of the mine?

A. He showed me statements of 582 tons, run during the months of July, August, September and October, 1893, with certificates showing that this bullion sold for $9,600, an average of 16 18/100 per ton, the lowest run he ever had.

Q. Was that Mr. Sigafus's statement, that that
258 was the lowest run he ever had?

A. Yes, sir.

Q. What was done with those reports he showed you?

A. I made a memorandum of them and he retained them.

Q. Did you believe the statements shown you by Mr. Sigafus on this point?

A. I did absolutely.

Q. Please state what is the value of ore in gold per ton of ore indicated by the figures you gave of the results of the mill test of fifty-one ounces and twenty tons.

A. $36.97.

259

Q. Did you, while in control of the mine, keep books and accounts of its products?

A. I did. To the best of my recollection at present it was a little over six thousand tons, and bullion that sold for about sixty thousand dollars. I extracted the gold from that ore at the mine. The highest rate of gold per ton that I took any month during my superintendence was about twelve dollars per ton. About two months it was as high as that. In other months it was six dollars, seven dollars, eight dollars a ton. Full monthly reports were made to Mr. Elbridge G. Wood at Haverhill, 260
Massachusetts. They were made in regular course of business; signed by me as manager, and sent tri-weekly and monthly. The monthly reports showed amount of ore hoisted, analysis, cost, shipment of bullion, returns. I knew the reports were accurate. I managed the mine from January 1, 1894, to middle of December same year. During that time I took out the best in quality and about three-fourths in quantity of the reserve. I have personal knowledge of the amount of gold produced in that time. I was making sales of gold bullion. I sold through Wells, Fargo Bank of San Francisco, and sent to U. S. Mint, San Francisco. 261
The price is fixed by mint reports. That was the regular way of fixing prices. I received a little over $14 or little over $15 per ounce. I sent monthly reports and receipts of mint returns to the treasurer of company. The cost of my getting out that $60,000 worth of ore, including mining and milling expense, was, to my recollection, about $60,000. As a result of my examination at the mines in November, 1893, I made a report to my employers on this mine. This paper (Plaintiffs' Exhibit C) now shown me is my original report. The statements of this report were in accordance with the facts, so far as I had learned them from my personal observation and the statements made to me by Sigafus and

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Cheatham. The figures in my report for the product of the mine during July, August, September and October, 1893, are the same as the statements made to me by Mr. Sigafus. The statement in my report as to the average of my assays being $23 refers to the assays of the samples I have already mentioned in my testimony.

Q. I call your attention to the statement of $884.40 per ton of the value of the eight-inch streak in the breast of the first level north. State what the facts were in regard to that. Where did you
263 get the ore and how much was there of it?

A. I took samples in the breast of the first level north from a streak about eight inches wide. This sample I divided into two, the larger one went with the other sacks into the office, the smaller I took with me and put in my valise as a sample of sulphuret ore, and had them both assayed, and the returns were about the same and not included in my average.

(Answer to question as to value of gold produced under witness's management changed to $65,000).

264 Q. If the drift had really ended where the defendant and Cheatham said, and if the mine had only been worked as far as they stated to you, what, in your opinion, would have been its fair market value in comparison with what it was, worked and opened as it actually had been?

A. It would be hard to give in figures, but in one case a prospective value existed which did not in the other.

Q. What, in your judgment, was the fair market value of the mine if it had been worked as represented and stated to you by Sigafus and Cheatham—with the average value of the ore, as shown by the assay of your samples and your mill run?

265

A. From $500,000 to $750,000.

Q. What, in your judgment, was its value with the workings of the mine as they actually were, and with the average value of the ore at $10 per ton?

A. About $50,000.

Q. What was the average value per ton of ore that you actually got out during the entire period that you worked that mine—about one year?

A. About $10.

266

Q. What was the exact depth of the south shaft of the mine as you found it to be by actual measurement?

A. About 395 feet. During the erection of the large mill I prepared the mine for a large output, which took place after the completion of the large mill. The only change in the method of working was in the method of pulverizing the ore. I cannot give the exact figures, now, but there was about $4.50 a ton increase of cost. The effect of the change of method was a large percentage of saving. I cannot tell how much; I would have to refer to my books.

267

Q. How many men were employed by the Good Hope Mine during your examination?

A. To the best of my recollection, Mr. Sigafus employed five or six men in the mine. I continued all except two in my employ.

Q. As to the product of mine in the past, what information did you have, if any, except that given you by Sigafus?

A. The statements in the Burnham report.

Q. Did you believe, at that time, the statements made to you by Sigafus and Cheatham?

A. I did, absolutely.

Q. On your belief in those statements, did you invest any money of your own in the purchase of this property, and if so, how much?

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A. I did, $15,000.

Q. What reason, if any, did Mr. Sigafus state to you as his reasons for being willing to sell the property? State your conversation with him on that subject fully and particularly?

A. I can't, after this lapse of time, give the exact terms of our several conversations, except that a few of his phrases struck me very forcibly. Nor can I describe them separately, as they extended to every time I met him. He stated that he had come to Riverside with his family, and had heard of this
269 Good Hope Mine. Old miner like he went to see it, and found it in bad shape, partners fighting. Considered it a good piece of property, so he bought it as an occupation for his son-in-law, J. Everett Bird, as well as for investment; that he had supplied Bird with plenty of money to develop the mine; that he had spent it in a big house and wasted the balance. Sigafus said that he thought he would make a man and a miner out of him. Instead of that, he was fit for nothing but a New York bookkeeper; that all his hopes in the man's ability to conduct the operations of the mine were lost, that to save the money for his grandchildren
270 and save his own investment he was compelled to stay at the mine himself, as he could trust no one else, whereas he had other large interests in New York, Arizona and New Mexico to attend to; that he was compelled to live at the place, it was distasteful to him, and his surroundings and associations, and in describing his troubles would sometimes burst into tears. That this was the lowest price which he had ever offered the property for sale, and he would not now, except to parties who would do the mine justice; that this was the last offer he was going to make for sale, and that if this was not taken up that he would either shut it down or make up his mind to exile himself to attend to its development personally, as he had to

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give up all hopes of doing anything with Bird or getting any assistance from him, as his previous training of two years in New Mexico would have justified him in expecting; that with his own advice and assistance Bird would make a success. This was the general style of his conversations, and they were numerous on this subject. Next to a record of operations covering several months or years, and kept honestly, in a free gold proposition, a mill run is the supreme test. In mines carrying base or smelting ores, the weights obtained are good evidence as a basis on which the ore are 272
bought and sold. In a free gold proposition the records and the only ones are kept by the owner. A free gold proposition is when the hold is free from combination with other base or precious metals. The Good Hope was a free gold proposition. The gold requires simply crushing and washing. A mill run would give an accurate test of value. I was not aware the mill run was not honest. I was not aware that any gold or ore was run through the mill that did not come up at that time regularly in the cars from the mine in the ordinary course of mining. I made my report to Mr. Charles W. Morse early in December, 1893, in 273
New York City. I also made oral statements to Mr. Morse, Mr. Porter and Mr. Hobson. These three I referred to my report and the statements made in my report, and advised the purchase. I gave to them orally a market value from $500,000 to $750,000.

This is my original report.

Paper put in evidence, and marked Plaintiffs' Exhibit C.

Q. I call your attention to a clause in your report where you state that the test mill run was 25 tons. What were the facts that led you to make that statement?

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A. I noticed that the cars were very full and the ore very dry. Hence I made that addition. I don't think I said anything to Mr. Sigafus or Mr. Cheatham as to my counting that a 25-ton run. I did not keep any account of the number of cars myself, but got the statement of the number of cars run from the foreman, Cheatham. I handed the Burnham report to Charles W. Morse early in December, 1893, in New York City. I was present at the passing of the deed in McIntyre & Taylor's office, Riverside, California; McIntyre & Taylor were attor-
275 neys for Sigafus. Morse was there. Two certified checks, payable to Morse & Eagan, one of $90,000 and the other of $60,000, were delivered, endorsed, to the order of Sigafus, to Mr. McIntyre. The size of the opening of the drift in the Good Hope mine on the first level varied from 3½ to 5 feet in width and from 5½ to 6½ feet in height on the second level was about the same as the other.

Q. Assuming that the ore body of the Good Hope mine had an average value of at least $17 per ton, and that the average width of the vein was 24 inches; that the length of the vein described by the workings was 950 feet; that the workings of the mine consisted of the main shaft 416 feet deep and
276 the south shaft 391 feet deep, the south shaft being 250 feet distant from the main shaft, with the drift in the first level at a depth of 250 feet from the surface, 950 feet long, with the opening of from 4 to 5 feet wide, 5½ to 6½ feet in height, with the drift in the second level 350 feet below the surface, 950 feet in length, with the opening of the same size, this drift in the second level running beneath the first for the entire length, and assuming that there was nothing at the end of the drift to indicate that the vein pinched out or disappeared, what, in your opinion, would have been the fair market value of this property?

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Objected to by defendant's counsel as incompetent and immaterial. Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. From $700,000 to $1,000,000.

Q. Assuming the same conditions, with these modifications, that the average value of the ore was $10 per ton; that the average width of the vein was eighteen inches, and that the conditions on the apparent ends of the drift on the second level were such as you subsequently found them and have heretofore stated in this deposition what, in your judgment, was the fair market value of the property?

278

Objected to by defendant's counsel as incompetent, irrevelant and immaterial.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. About $50,000.

209 Q. What did you find to be the fact when you came to work the mine yourself as to the real width of the vein?

279

A. It averaged about eighteen inches.

210 Q. What facts did you ascertain of your own personal knowledge as to anything that had been done to give the apparent width of 24 inches at the time of your examination?

A. When the streak was small they followed it until it got big, and then leave it standing.

The large mill I put in increases cost slightly. The new mill had five times the capacity of the Bryan. It exceeded the capacity of mine. I managed the mine as economically as possible.

Q. From the statements to you of Sigafus and Cheatham to which you have testified, and from the mill run as made, and from the appearance of

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the mine and the drifts on the second level closed up as you have testified, did you or did you not conclude that the statements of the Burnham report were or were not accurate?

Objected to by defendant's counsel as incompetent, immaterial and irrelevant. Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. I concluded that in the main details the state-
281 ments in the Burnham report were accurate.

Cross-examination:

I came to go to the Good Hope Mine from the fact that the Burnham report had been laid before me for examination, and on my stating to Mr. Morse and Mr. Platt that it was worth investigation I came on. That Burnham report was sent to me by mail by James H. Platt from Chicago in September or early part of October, 1893. Platt died about a year ago. He was president of the Denver Paper Mills Company, of the Coal Company and other enterprises in Colorado, and largely interested
282 in the mines in Colorado. With the report he enclosed a letter, photgraphs, etc.

I had been engaged as manager and part owner in property in which Col. Platt was largely interested. Mr. Morse and Mr. Platt employed me, and beyond the price of the railroad ticket I paid every other expense out of my own pocket. I worked under Mr. Morse's instructions, and he intended to come with me besides.

Q. Then the expenses of the trip, exclusive of the railroad fare way from Denver to Riverside and return, and your expenses in California en route and your services while employed in making this so-called examination of the Good Hope Mine, as

testified to by you in your direct examination were gratuitous on your part, were they?

A. No.

Q. Did you not state with the exception as testified to you paid all your own expenses?

A. I did.

Q. State what part of your expenses and services were gratuitously rendered by you to Mr. Morse, your employer, and what part you charged for, in detail.

Well, they were practically gratuitous, except on another occasion. If the property was satisfactory 284
Mr. Morse would help me in the purchase and retain an interest.

Q. Then the retaining of this interest in the property was to be compensation for your services in making the examination and the report thereon?

A. No; because I had done a good deal of such work for Mr. Morse, and my bill of expenses had always been paid when rendered. I did not submit any bills in this case. He was not in Denver on my return from California. I was present at Mr. McIntyre's office in Riverside with Mr. Morse when the title and check passed, and the property turned over at that time. I didn't present a bill to Mr. 285
Morse for services I had rendered, because he had assisted me in obtaining an interest in the property, and Col. Platt was also to bear part of that expense. Through me Col. Platt became interested in the property. In stock and notes payable to the proportion, I don't exactly remember. When my share of the property should liquidate notes made by me for the purchase of stock, then Col. Platt should have an interest in said stock.

Q. Will you swear that you didn't know that the property was conveyed by Sigafus to Griffith, and that he gave back a purchase money mortgage thereon?

A. I heard it afterwards—was told about it.

286 Q. Were not all the details of the transfer in Mr. McIntyre's office discussed, and were you not then present; and will you now swear that you didn't know at that time to whom Sigafus was to deed the property, and that a mortgage was given back to him?

A. At this lapse of time it is hard for me absolutely to recollect; but I don't think I was present when every detail had been arranged, as I was out of town at the Good Hope Mine part of the time, yet I cannot swear that I didn't know.

287 Q. In what way did you expect to be interested in the mine—as a stockholder?

A. Yes. sir; I cannot swear that I didn't read the deed, as my recollection as to the various details is not very strong. I will not swear that Mr. McIntyre didn't hand me the deed and explain to me, Morse and Griffith concerning the same, together with the other papers drawn by him at the time. I know nothing of any papers being served by one Maxwell on Mr. Sigafus, but knew that Maxwell claimed a share of the commission.

288 Q. Don't you know, and were you not present when Mr. Sigafus stated to McIntyre and to yourself, stating that he (Sigafus) was not going to sell a law suit, and didn't care whether you purchased the mine or not, as the matter has assumed that shape that he (Sigafus) would not sell the mine unless you and Morse gave him a bond of indemnity, which bond you and Morse did then and there give, drawn by McIntyre, signed by yourself and Morse, and acknowledged?

A. Any specific remarks made by Mr. Sigafus as given in your question I do not remember, but I remember McIntyre's advice, as his legal adviser, that such a bond should be given, and also remember signing it with Mr. Morse. I remember that at that time in order to quiet Maxwell, Griffith gave him two notes of $6,000 each, and that thereupon

Maxwell gave a release of all claims and demands as to commissions, and that thereupon when that was done Sigafus gave the deed, and that Mr. McIntyre drew up a release under seal for Maxwell to sign, and that he read the same to me. 289

Q. Now, Colonel, don't you know that the most important paper in the whole batch must have been the paper that transferred the title in the property in which you were to become interested, as you have testified to?

A. Yes, sir. I knew that a deed was given, and I have since learned how it was given, and to whom it was given, and I was satisfied it was a good and sufficient one, as you were acting in the interest of both parties in the transaction. 290

Q. What were you asked to do by Mr. Morse and Platt when you got to the mine?

A. To thoroughly examine the Good Hope property, and to see if the Burnham report would be verified by such examination.

Q. What other papers were handed you besides the Burnham report by Mr. Platt concerning this mine?

A. In the letter enclosing the report there were some photographs and maps, also a letter from Mr. Griffith to Col. Platt, asking that the property be examined as soon as possible; and also detailing the reasons why Mr. Sigafus desired to sell the property, and his own delay on account of his father's death; the same letter contained other mining reports. 291

Defendant's counsel moves that last part of answer be stricken out as incompetent and secondary.

Motion denied. To which ruling of the Court counsel for defendant then and there duly excepted.

I never heard of Mr. Lockhardt's having made a

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report of the Good Hope Mine until within the last year. I have never seen it. I never met Griffith to speak to him, except a couple of weeks before my going to examine the Good Hope Mine, and then only for a few minutes.

Q. How do you know that this (counsel handing witness Plaintiff's Exhibit "A") is the Burnham report, or any other man's report?

A. Because on the occasion of first meeting Mr. Griffith to speak to him; amongst many other questions I asked him who made that report, as it was
293 not signed. He told me a California mining engineer by the name of Burnham. The copy I received has neither date nor signature, but from details and statistics given I judge that it was made earlier than 1892.

Q. If the so-called Burnham report had been designated the Smith or Jones report, you would have acted upon it just the same, would you not?

A. Not until I had inquired whom Smith or Jones were, and I would also consider the standing of the party of whom I received it, and the party owning the property. I cannot say positively when I got the report because it came with several others,
294 and laid in my desk several days before I had time to look at it, but the date of the letter was the latter part of September, or during the month of October, 1893. I cannot swear of my personal knowledge that such a man as Burnham was on the ground. Mr. Sigafus, Cheatham, W. S. Maxwell and James B. Doran told me. I never saw any report on the mine but the Burnham report. Never saw one dated July 5th. I didn't place much importance on the Burnham report, or any report, until it was verified by myself, then I would.

Q. Then you wish it understood that you examined this property as a mining expert of twenty years and over, and recommended its purchase, based principally upon statements and figures con-

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tained in a document unsigned, without date and without seal, having no personal knowledge of the characterof the individual, of the person whom you say made the report, which information as to the maker of the report, is purely hearsay?

A. I asked what had become of the original report, and was told by Griffith that it had been mislaid; the date was omitted as well as the name, but that might be an error—that is, the omission of the date made in making a copy. Again, the Burnham report was so exhaustive and, as Mr. Sigafus stated, extended over so long a time, that in the limited 296
time allowed me it would be impossible for me to verify every little detail of the report. Therefore, I had to accept the verification of the main details of the report, and hence judge the truth of the rest of it; and as to Mr. Burnham's character, there are many mining engineers in California who are unknown in Colorado and *vice versa*. And Mr. Sigafus described him as a hard-working, capable little fellow.

Q. Where are the maps that accompanied the alleged Burnham report to you?

A. I left them in my office in Georgetown, Colorado. 297

Mr. McIntyre: Defendant's counsel now gives notice to produce said maps upon the trial of this case.

Mr. Sigafus showed me and I examined a very complete and neat abstract of title to the property.

I found the vein to be a fissure vein in granite, with a course a little east of north and west of south, with fairly well-defined walls.

Q. Why is it that you are able to produce a copy of the Burnham report and not the maps and photographs that accompanied it, had reference to, and was connected with the same?

A. Because in my own office I read over the re-

298 port in going to Denver, and inadvertently left them behind, and because Mr. Griffith particularly asked me for them. I made field notes of my examination of the mine. They are made in a small black memorandum book, which I had in my possession up to the time I went to New York, and in a safe place in my library, and on starting for New York this summer I think every member of my household hunted everywhere but could not find it. I also made small maps at the time of the examination. They were on that book until they were copied into a larger book. They are also lost.

299 Q. Didn't you make your own report to average 24 inches of pay ore, regardless of what you found in the mine?

A. No, sir.

Q. You remember that the Burnham report refers to a continuous development of 900 feet in the ore chute, with a contract made for 200 feet more, if this report was two or three years old, as you have testified to, why didn't you look for the additional 200 feet in the drift, if you verified this report, as you say you did?

A. If you will notice in the Burnham report that he counts work done in the sinking of the vein as

300 well as drifting in his aggregate development.

Q. Do you know how much block one figured up in length and height in the Burnham report, from the drift to the grass? I am examining you on the Burnham report, and when I change to any other report I will so state, so that you may not be misled.

A. I don't remember the figures. My blocks were different from Burnham's, as there evidently had been a great deal of development work in stoping between the day I took to be the date of the report and my visit, and not having made maps showing the various blocks, I cannot now identify them from memory after a lapse of nearly two years. I

hadn't the time to verify the Burnham report in every small detail, in the more important parts I endeavored to. 301

Q. The report states that the average width of the pay streaks was ascertained by measuring every 10 feet through the workings, while it appears in the table that there were only 110 measurements, 10 feet apart, or 1,100 in all; why did you verify the average, and why wasn't the other 1,800 feet measured by him, as you stated you verified the report?

A. Because I allowed for a great deal of ground that had been opened up between his report and mine. 302

Q. The report shows that there were no widths taken in the shafts 1 and 3, and none taken in the upper level north of shaft 2, except 34 measurements, or 340 feet, and no measurements at all in the lower level north of shaft No. 2. How do you reconcile this, and what report did you make concerning the same?

A. In the main shaft, as the first 250 feet is sunk in the hanging wall, no measurements could be taken of the streak. When I was there it was not safe to go into the south shaft; as to any workings north, the drifts may not have been driven at that time. As far as I could tell, the first level south was only stoped up 15 feet, and the second level south, near the shaft, about forty-five feet, but a fissure of ground was left in the shaft, except a hole broken through for air. 303

Q. Wasn't the reason why you didn't go down into the south shaft because you were told that that was the end of the mine, the dyke being there?

A. No, sir.

Q. Is it not a fact that openings led from it at different points south of the south shaft, and that the old workings south of the south shaft at the upper level were open, and ran into the ground there, and that the lower level was then open, a

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drift south of the south shaft running in about 150 feet?

A. There were no workings of that kind apparent to me.

Q. Did you not go into this level with Sigafus and Cheatham and talk with them about the hardness of the ground at this point?

A. No, sir; I don't remember anything of the kind.

Q. Will you swear you did not?

A. To the best of my belief I swear I did not.

305 Q. Is it not a fact that you went up the whole of that shaft?

A. It is a fact that I did not.

Q. What did you find at the north end of the ground when you stoped it over the 80 feet you say was covered up; did you find good ore or poor ore?

A. We didn't stope that up; we had put up the raise about 85 feet in height and bore over into the foot wall before we found any ore. We uncovered the 80 feet. There was no ore there. I testified that I did not examine all of the workings described in the Burnham report; in fact, most of them had caved in; all the main workings of the mine that I

306 could get at with safety I examined. Mr. Sigafus didn't place any limitation on my time for making an investigation and verification of the so-called Burnham report. In testifying as to the value of the mine I had in mind such portions thereof as I actually saw, and, of course, I took a great many of Mr, Sigafus's statements in walking over the surface ground, the values of ore, that I had no reason to doubt any statements he made

Q. Did your employer, Mr. Morse, tell you to rely upon Mr. Sigafus's statements?

A. He did not.

Q. Could you verify the statements of Sigafus just as well and just as easily as you could the

statements contained in the report which you didn't know?

A. I suppose I could, if I got any statement from Sigafus; it was hard to get him to talk about the mine, except by direct questions, and then he talked in a general way about its great richness and his reasons for selling, and it is a fact that I got the data as to the main developments then in use from Mr. Sigafus and used them.

Q. Therefore he placed you in a position, while giving those figures to you, to prove the truth or falsity of the same, if you chose? 308

A. Yes, sir. In my experience as a mining expert in passing upon the value of such property, before I recommend the purchase I make an independent examination. I would verify the owner's statement myself. I did verify Mr. Sigafus's statements, to the best of my ability and with the means at my disposal. That verification was before the sale to Griffith. Mr. Sigafus didn't make any statements that were not true, but he neglected to tell me that the second level north was driven 80 feet further than apparent, and the second level south 150 feet further than was apparent, and I don't believe now the ore from that mine averaged $20 per ton since the working of the mine, as he stated. I found it out quickly after starting to working the mine on a larger scale. 309

Q. State the month and year you found it out.

A. In May, June, July, August, September, October, November and part of December, 1894.

Q. Did you communicate your discovery in writing to your employers?

A. Not as a discovery.

Q. What was the date of the first letter in which you communicated the discovery to your employers at Haverhill?

A. The returns of the bullion from the mill sent in the regular reports to the company showed the

grade of ore which was mined was much lower than expected.

Q. Then I understand you to say that you merely sent reports of that character to the company at Haverhill, Massachusetts, unaccompanied by any letter or suggestion of the discovery you speak about.

A. I understand, Mr. McIntyre, that you refer to the fact of the ore running so much lower. As I stated before, accurate reports were sent to the company, accompanied by letters.

311 Q. In your answer to cross-interrogatory No. 105 you say, "he did not make any statements that were untrue, but he neglected to tell me that the second level north was driven 80 feet further than apparent, and the second south 150 feet further than was apparent, and I don't believe now the ore from the mine averaged $20 per ton since the working of the mine, as he stated." Now, I will get you to state with that explanation if you communicated the fact in writing to your employers of the discovery of the two drifts referred to that you say Sigafus neglected to tell you of, and also, if you communicated in writing the discovery you made of the ore running less per ton than you

312 expected?

A. Yes, sir. I cannot give the date and the persons to whom it was communicated; it was, probably, Mr. Wood, Mr. Porter, Jones or Morse. As to the south drift early in the year 1894; as to the north drift in the fall of the year 1894, I cannot give the month. Such communications were sent to some officer of the company. I kept copies of my letters sent to the company—of nearly all; not of all. They were kept in a copying-book—a press copying-book. I cannot say where that book is now. I left it at the Good Hope Mine and delivered it to William Foster, my successor as man-

ager. Such letter-book belonged to the company, and was part of its records.

Q. The bullion report in the Burnham report gives the amount of bullion produced in the last 12 months at $57,800. I will call your attention to that table, and that it doesn't give the amount for any specific 12 months, and especially for the 12 months covered by the expense period; how do you get around that?

A. The summary gives a total expense of producing that bullion as $15,509. On another page the monthly expenses are given for a corresponding 314
period, amounting to $5,779.56, and the pay-roll, $9,729.44, making the $15,509 referred to in the summary. I paid little attention to those figures (total product, $260,000), as it is stated it was made from careful inquiry. It was one of those cases that often happened in the early history of the mines, when parties did not keep accurate records, so-called; I paid little attention to that. In this case the output was from old workings, as evidenced by dumps and caved shafts. I have no doubt that a great many thousand dollars were produced from that mine, but to verify that $260,000 is impossible, nor is it given great weight in 315
that report by Burnham himself. That $260,000 represents the product of the old workings.

Q. Then, certain portions of the report you acted upon and gave credence, while other portions you didn't; is that correct?

A. This statement is under head of history, and not as statistics.

Q. What do you understand by the summary of a report?

A. The aggregation of figures given in the report.

Q. In your investigation did you give credence to the summary in the report?

A. To those portions which I could reasonably demonstrate myself. I demonstrated the length of

316 ore chute to be over 3,000 feet. I made maps only of the underground workings then in use. I found the lowest depth in the mine to be about 385 feet. The number of feet developed on levels was about 2,000 feet in the main workings. The width of the fissure was from a few inches to five or six feet, or more or less. The average width of the pay-streak was a little over 24 inches. I found the tonnage in that reserve 46,922. I asked Mr. Sigafus if the statements as to the bullion returns were correct, and he said they were carried out correctly in the
317 sheet, giving the various dates, and that the expense account was correct.

Q. Didn't you testify that you went out to verify the Burnham report?

A. Yes, sir.

Q. Then in this particular instance you didn't verify the Burnham report, but relied on the statements of others; is not that correct?

A. To the best of my recollection, the Burnham report states that those figures had been obtained at the mine.

Q. The Burnham report in the summary shows $317,000 produced; how do you reconcile that with the statement that $260,000 was produced?

318 A. It adds, I presume, $57,000 with the $260,000.

Q. How does it do so?

A. I suppose the figures added together make that amount.

Q. What did you find the product to be under the ownership of Sigafus?

A. $9,618 added to the other tables. Mr. Sigafus stated to me as a reason for not running the mill and working the mine continually that he was away a great deal of the time; that he shut down, as he could trust no one to attend to his business.

Q. In the Burnham report the tonnage in reserve is given as 44,733, while in your report to your employers you give the tonnage in reserve to

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be 46,900; when and how do you get those figures?

A. By measuring along the levels up the stopes, and up the raises where practicable.

Q. In the Burnham report how did you verify the width taken in shaft 1 and 3?

A. I don't know which shafts they are; the south shaft I was unable to get into, but I was able to get to it from two stopes; the main shaft I was able to verify, I think, within 50 feet of the first level; from the first level to the second, and down to where the water was pumped up below.

Q. How did you verify widths taken in the first 320
level north of shaft No. 2?

A. By measuring along the stopes; but understand this, that I could not tell where Mr. Burnham started to measure his 10 feet, so I could not verify each individual measurement.

Q. Did you verify the measurements in the lower level north of shaft No. 2?

A. I verified them as far as possible by taking my own independent measurements.

Q. The Burnham report stated that the cars held 12.3 cubic feet; is that correct?

A. Yes, sir.

Q. Is the weight per car stated in the Burnham 321
report correct?

A. Yes, sir.

Q. The understanding between you and Sigafus was that 3 cars be allowed to the ton, was it?

A. Yes, sir.

Q. In this respect you were following the custom of the mine?

A. Mr. Sigafus and I thoroughly discussed the matter in discussing the mill run, as the cars are not always full. Different sizes and the ore different degrees of moisture.

Q. I believe you testified that the figures in the Burnham report as to the cubic feet per car and the weight per car were correct?

322 A. Yes, sir. But I cannot say the same cars were used, but if the same cars were used the figures are correct. In going down the shaft I went down slowly and reached out with a foot rule at every opportunity, and in the stopes I measured with the foot rule the width of the quartz and the amount of vein filling that would go to the mill, and measuring the quartz every ten feet along the stopes and in the drifts. I arrived at the mine to make the examination in the afternoon of November 19th. The examination commenced that afternoon. I
323 cannot say exactly when the mill run commenced; I think about the 21st of November, 1893. It continued, I think, three and one-half days. On the first day I went out I wore a linen duster; on returning to Perris on the 17th it was so cold and a heavy snow falling that I had to borrow an overcoat from Mr. Sigafus; this weather continued for a day or two; after that it was the usual weather.

Q. Did the cold, severe weather continue during the mill run?

A. Not as bad as that, because I was able to sit around in my shirt sleeves out of doors.

324 Q. Colonel, in testifying to the value of the mine you base your computation upon what you examined and saw yourself?

A. Yes, sir; and other evidence and memoranda.

Q. Then when you testified the mine to be worth $50,000 or thereabouts, the $1,000,000 computation of value would be based upon portions of the mines and notes thereof you didn't see?

A. Yes, sir; but I saw the surface.

Q. During the mill run who remained in the office, yourself or Griffith?

A. Griffith was there all the time. Putting in the time as best he could and drying my samples; I had him at work upon the crusher, but he got tired out. I think he went away a day or two be-

fore the mill run was completed; as to his being there late at night, he and I used to spend our evenings there until he went away; after that I spent my evenings at Mr. Sigafus's house. The yellow house on the hill. That house is about 400 feet from the mill. 325

Q. You say that the mill run itself lasted about three and one-half days, after that what was done by you and how long did you stay at the mine?

A. To the best of my recollection I stayed long enough to see the retort made; I went away on Saturday, the retorting was completed on Friday. 326
I think the run commenced on Tuesday. Mr. Sigafus did the retorting at my request in the blacksmith shop. In my presence part of the time. The weight of that retort was 51 troy ounces.

Q. Was it not avoirdupois and not troy weight?

A. I think it was 55 avoirdupois. Mr. Sigafus kept the bullion.

Q. You left your samples, you say, with Griffith, and had him crush out and grind the same for you, I believe, you testified?

A. I didn't say anything of that kind. I said I had him assist me in doing the rough crushing with the small hand-crusher. He was doing that work in the company's office where such work was 327
usually done.

Q. And he was in the office then doing the work when you were out about the mine or at the mill?

A. No, sir.

Q. How much of the time were you absent and where did you go?

A. Mr. Griffith spent two or three days in the mine with me till he got tired, and the rest of the time previous to going away, he made the office his headquarters, and I cannot say how often I was absent nor how long, but I went down in to the mine several times, in and around the mill several times and around the hoisting works.

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Q. Griffith bought the mine, didn't he?

A. I believe so; a formal deed was made.

Q. Don't you know that Griffith bought that mine and that he sold it to the parties you represented?

A. I believe that was the form of the transaction. I will swear that I didn't receive any note nor any money in that transaction. I was to receive something on the transaction. A proportionate interest in the $50,000; about one-half. From Mr. Morse. It was contingent on the success of the property, and
329 when I found it was not a success I threw it up voluntarily.

Q. Was that the understanding and agreement between you and Morse, and was such understanding an agreement in writing that you were to receive such interest prior to the sale?

A. It was not.

Q. But the agreement of your receiving the $25,000 was, of course, prior to the sale, was it not?

A. Yes, sir. Mr. Griffith didn't send for me to come to California and make this examination of the mine. It was not understood and agreed by and between myself and Griffith, that if he, Griffith, purchased the mine I would share in the com-
330 mission. I testified about going over the surface ground with Mr. Sigafus. We passed over a porphyry dyke that runs parallel with and west of the vein.

Q. Don't you remember at that time Mr. Sigafus telling you that the shaft No. 1 there was at extreme south end of the mine, or what he called the end of the mine, where the dyke or footwall made sharp turn to the west?

A. I took the figures he gave me and put them in a book. To the best of my recollection now the sketch was on a sheet of paper very unhandy to carry around in the mine. It was an ordinary sheet of wrapping paper about 18 inches square. I first

met Griffith to know him. I think it was, in 1892. I was introduced to him sometime in October, 1893, at the Oxford Hotel, in Denver, Colorado. I had no direct correspondence with Griffith at all. He expected Mr. Morse and I to come, that was an understanding at a meeting at the Oxford Hotel, at which Morse, Platt, Griffith and myself were present. Colonel Platt introduced me to Mr. W. H. Griffith and told me to talk over that California matter with him; I did so and Mr. Morse joined us and asked me what I thought of the report. I said if that report is true, that mine had been made to order. I asked him on that occasion who made the report; why it was not signed and dated. He told me who made it, and said he had lost the original, and I said that was pretty rough.

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Q. Is it customary among mining experts to entrust the crushing and manipulation of ore samples to a stranger during the running of a mill test to ascertain the value of the mine from the assay then made?

A. No, sir.

Q. You stated that the mill run was three and one-half days, you thought—you didn't know; don't you know that it was impossible for that mill and the force at your disposal to make a test of 63 cars of ore during that time?

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A. No, sir.

Q. Will you swear that it can be done, and was done at that time?

A. I will swear that it can be done, but as I am not positive of the number of days I cannot swear to the second part.

Q. Will you swear that those 63 cars of ore were put through in the time you say this mill run was made?

A. To the best of my information and belief, yes, sir.

Q. Do you remember the circumstances of Sigafus

334 stating to you that Doran wanted the position of storekeeper at the mine on account of his enfeebled condition, being sick at the time, and as he would probably never be able to do severe labor again, and asking your consideration in his behalf; you stated that you were always glad to help an old miner whenever you could, and prior to your leaving, Sigafus took you up to the house, introduced you to Doran, and that matter was discussed between Doran, Mrs. Doran, Sigafus and yourself?

A. No, sir; I do not. I talked with Doran and
335 Sigafus separately after my return. I invested $15,000 in that mine. I paid it, I think, to Dudley Porter and John L. Hobson, the trustees, and $5,000 to E. G. Wood, treasurer. I borrowed $10,000 from C. W. Morse and $5,000 from Mr. John L. Hobson. It has not been repaid. The company was capitalized at $1,000,000. I got $75,000 shares; representing in value to me an investment of $15,000. I considered at that time that Mr. Morse did me a great favor in loaning me that $10,000. I didn't pay the money in, but borrowed of Mr. Morse, and he paid it in for me through the bank.

268 Q. Was not the mine sold by Griffith to your
336 employers?

A. As I stated before, I believe that was a form gone through, but the money from my employers paid direct to Mr. Sigafus's attorney, yourself.

269 Q. Wasn't the deed made by Sigafus to Griffith, and wasn't Griffith given back a $100,000 mortgage, and wasn't that arrangement made so that certain notes might be kept and divided among the sellers?

A. I understand that such was the case—that a mortgage was given back, but for the purpose I have no knowledge about that.

270 Q. Were you not to have one of the $6,000 notes that was covered by that mortgage?

A. I believe so.

271 Q. Did you receive the $6,000 note that was to come to you in that figuring?

A. No, sir; I didn't.

372 Q. How is it you didn't receive it?

A. Because, I believe, that I was told that it was paid to Maxwell.

273 Q. With whom did you have the conversation—was it not with Griffith—about the receipt of this $6,000 note by you?

A. No, sir; I had very little conversation with Griffith.

274 Q. What was the purchase price of the 338 mine?

A. I think it was $230,000.

I was told by Morse that I was entitled to a $6,000 note. I was not expecting anything of that kind on the first mortgage. Mr. Morse and myself executed a second mortgage covering the same property, and signed notes at Riverside about that time. When Mr. Morse and I executed that mortgage and signed those notes, we signed the same by virtue of a power of attorney for Hobson, Morse and Porter, the plaintiffs in this action. The mortgagees named in that instrument were, to the best of my belief, 339

Samuel F. Thompson,	$5,500
Charles M. Derrickson,	2,750
C. E. Whistler,	1,375
W. K. Graham,	1,375
Caroline F. Griffith,	3,000
Samuel B. Griffith,	3,000
Jacob Fillius,	108,000
Total amount,	$125,000

That mortgage was part of the purchase price that had been paid for the mine.

Q. Did you not state that the purchase price of the mine was $230,000 in favor of Sigafus?

A. Yes, sir.

340 Q. Then, to the $230,000 purchase price in favor of Sigafus was to be added this $125,000 which was to be the figure that you people were to sell the mine for to the Haverhill parties; is that correct?

A. That is less than the price which I reported to Mr. Morse the mine was worth. The total price was $400,000.

Q. Is it not a fact that this mortgage of $125,000, together with the notes secured thereby, was repudiated as a fraud, and that a Jacob Fillius made to disgorge and surrender his note, which he did do,
341 and the same was cancelled by the parties you had these transactions with?

A. Not to my knowledge, sir.

Q. Wasn't your removal as superintendent and manager of the Good Hope Mine, because, and on account of these dealings, and the execution of these notes and mortgage?

A. No, sir; it was not. As the company months before acknowledged the transaction and I voluntarily gave up all the interest I had in the notes. I had an interest in the note of Jacob Fillius of $25,000 or $30,000.

Q. Then if you had an interest in the Jacob Fillius note of $25,000 or $30,000, you, under such
342 power of attorney, made a note payable to yourself to the extent of such sum, and you had an equity in said note to the amount of $30,000?

A. Yes, sir. Mr. Morse asked me whom I would like as a personal friend to act as trustee of that note, and I told him Mr. Jacob Fillius had been my attorney for a great many years. The note was made to Jacob Fillius, as trustee. I gave up all my interests, as did Mr. Morse, in that note, long before the suit was started by Maxwell. I think late in July or early in August, 1894. I left the management of the Good Hope Company as a result of a letter from Mr. Porter, the president of the company, in which he stated that there was great dis-

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satisfaction amongst the stockholders from the meagre returns of the mine; that he had been led to believe, not only from myself, but others who had visited the property, it was lying in my engagement; after that I telegraphed my resignation to Haverhill, Massachusetts, and it was accepted. That letter did not demand my removal, but, after reviewing it, I considered the best thing I could do was to telegraph my resignation, and it was accepted. To the best of my knowledge and belief, as expressed by that letter and official letters received after I telegraphed my resignation, 344
my action in signing that mortgage had nothing to do with my leaving the company. The company never questioned orally or in writing itself, or by any one representing it, my action in the execution of that mortgage, and the notes secured thereby. The Griffiths whose names appear in the said note as payees and mortgagees named in the mortgage are relatives of the W. H. Griffith who assisted me during the mill test, in the manner, and at the time, as testified by me. The giving of those notes to the said Griffith was in accordance with an understanding by me with W. H. Griffith at the time the same were executed. 345

Q. Don't you know that Jacob Fillius only surrendered that note in which you had an interest of $30,000 in the face of a criminal prosecution, and that he got frightened and surrendered the note, and that the same was cancelled by the company?

A. I had no personal knowledge at all.

I remember going to the end of the second level south, 250 feet south of the main shaft, with Mr. Cheatham. I remember Cheatham asking me about climbing over some kind of an obstruction in one of those south levels; which one it was I don't remember. When we came out where this drift left the main shaft I made a remark to Cheatham about the hardness of the drift. Cheatham and I

346 John M. S. Egan.

visited the north end of the first level. I remember there was a rich streak of ore there. I took my samples at the face of this drift when Cheatham told me there was this rich streak which I have already testified I took my samples from. Besides the regular samples I took in the breast, I took samples of the rich sulphurets and put them in a sack, but those were not placed with my regular samples. I asked Cheatham also to get a sack of rich ore, and he did. I remember of some ore that ran, during my examination of the mine, $800 to
347 the ton. It is a fact that the rich ore that I assayed that ran $800 per ton was taken from this very drift. My salary as manager was $500 a month up to October, 1894, when I volunteered to cut it down one-half myself. I drew three months' salary at $250, and nine months at $500. I paid an assayer $125 per month, a bookkeeper $125 per month, as bookkeeper and cashier and storekeeper. We had three to four engineers at the rate of twenty-five cents an hour, and ten or twelve up to fifty miners at the rate of $2.50 per day each. I might have had sixty-five men underground. I cannot answer whether there were seventy. The regular force on
348 top was: head machinist, at $100; blacksmith at $90 per month; these two men worked Sundays and nights or days, if called upon; there was a "roustabout," at $2 a day; two trammers, they were paid $2 each; and from three to four men in the mill, one at $3.75 per day of twelve hours, one at $2.75 per day of twelve hours, the other at $2.50 per day at twelve hours each; one man at the pumping-engine, half a mile from the mine, at twenty cents an hour; as repairs or extra construction were required there was extra laborers required for that purpose; in the number in the mine was included the head foreman, who received from $100 to $125 per month, and the night boss, who received $3 per day; also included timbermen,

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varying from two to four in number, who received from $2.75 to $3 per day each. I never took a day's vacation during the time I was manager of that mine; whenever I was in Los Angeles I was on the company's business. I cannot say how often; not so often as once a month on the average. I considered that I was buying a million-dollar mine for $230,000.

Q. Colonel (handing witness a paper), I will get you to look at that paper, and state if it is in your handwriting, to whom it was written, from where, and the date thereof.

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A. It was written to James M. Sigafus, from the Good Hope Mine, June 25th, 1894, on one of the official letter-heads of the company, showing my name as general manager.

Counsel asks that the original of that letter be identified by the notary, and that the copy of the same, duly proven as being a correct copy thereof, be identified by the notary, and marked by him as Defendant's Exhibit "A," and that it be admitted in evidence as part of this deposition.

So marked.

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Mr. McIntyre (handing the witness a letter): Is that letter in your handwriting and the signature thereof and the postscript at the bottom?

A. Yes, sir.

Q. To whom was that letter written, from where and what date?

A. To James M. Sigafus, Perris, California; from Denver, Colorado, November 29th, 1893.

Marked "B."

Mr. McIntyre (handing witness paper): I will now get you to state what that paper and letter is.

352 John M. S. Egan.

A. A letter from myself to Mr. Sigafus at the Good Hope Mine in California, written from Georgetown, Colorado, November 30th, 1893, and signed by myself. The writing and signature to the same are my own.

Marked "C."

Q. I call your attention to your letter in evidence as Defendant's Exhibit "C," referred to, wherein you state as follows: "I must have made some serious mistake in sampling the tailings, as
353 Mr. Graham's assay give 2.80 au and 1.70 ag., whilst the crude ore only run 1.50 au. and 1.00 ag." When you found the serious mistake why didn't you return to California and make another examination and rectify the error, as you call it?

A. Because the return was so outrageous and the mill run of the crude ore was so satisfactory that I didn't deem it of sufficient importance, especially as I didn't in my report make any estimate of value of the pile of tailings in the dump.

Q. Did you inform your employer of the discovery of the mistake referred to in your said letter, marked Defendant's Exhibit "C"?

354 A. I presume I did, as I talked over every detail with him, and showed him this list of assays, as well as several others. I met him by appointment. Mr. B. B. Jones, attorney for the Good Hope Mine, first asked me to testify in this case.

One sample was from eight inch streak, the rich streak spoken of; that was with my other samples, not included in my average assay of the ore body of the mine; I also took another sample for my own use of some very heavy sulphurets; these I had assayed and never mentioned in my report.

Defendant's counsel, at the request of plaintiff's counsel, reads in evidence the letters A, B and C, which, during the cross-ex-

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amination of Mr. Egan, were identified by him as being in his handwriting, and were then marked for identification, being dated respectively "Good Hope Consolidated Gold Mine, November 29, 1893, November 30, 1893 and June 25th, 1894," all being addressed to J. M. Sigafus.

Plaintiff's counsel offers in evidence the Burnham report, reading only the most material portions, the copy produced being verified by the notary, and identified in the deposition of Doran and Egan.

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Defendant's counsel objects to the offer as immaterial, not connected with the plaintiffs, and not shown to be a copy of the original.

Objection overruled. Paper admitted in evidence, and marked Plaintiff's Exhibit A, to which ruling of the Court counsel for defendant then and there duly excepted.

CHARLES W. MORSE, called as as a witness on behalf of plaintiff, testified as follows:

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I reside at Haverhill, Mass. I have been in Denver for nearly two years. I am one of the plaintiffs. I knew Colonel Egan in his lifetime, and have met Mr. Sigafus, the defendant, in connection with the purchase of this property. Mr. Egan made an examination of the property. William H. Griffith first suggested this property to me in Denver in November, 1893. I first came into communication with Colonel Egan at the same time—that is, in relation to this property. I had known Mr. Egan as a consulting engineer in a silver property in Ouray, Colorado, in which I was interested. The property was mentioned to Colonel Platt and my-

358 Charles W. Morse.

self by William H. Griffith, and after talking the matter over, Colonel Platt said: "We will send down and make an examination of the property." Mr. Egan at that time had the Burnham report and he made the remark that if the Burnham report could be verified it was a mine "made to order"—that is, a good paying mine, but he didn't believe it could be; that is why we sent him down. Colonel Egan went down four or five days later. I did not go with him. His instructions from Colonel Platt and myself were to examine the mine and report
359 to us on it, with a view to our possible purchase of it. I next met him, I think, in the Astor House, New York, about the first or second of December. This examination of the mine had then been completed.

When he left Denver to examine the mine nothing whatever had been said as to the arrangements for its purchase. No decision had been reached that we would go into the property; we were waiting for his report. At that time nothing had been said as to his having any interest in the purchase. And at that time no arrangement or bargain of any kind had been made with Mr. Griffith. This interview which I have just testified to between Mr.
360 Griffith, myself and Colonel Platt lasted, I should say, five minutes. Egan made a typewritten report, signed by him. This paper now shown me (Plaintiff's Exhibit Egan Report) is, to my best recollection, the original paper.

Mr. Stickney: The paper is already in evidence and it is endorsed "Report of J. M. S. Egan, Elbridge G. Wood."

This report of Egan was shown to me. A copy of the Burnham report was put in my possession by Mr. Egan at the same time this report was given to me. Up to that time no decision had been

reached as to my going into the property in any form, or to Egan's having any interest in the purchase. There was no one else so far as I knew who had any connection with this examination down to that time. When Colonel Egan arrived in New York with his report he telegraphed me to come over and meet him here, from Haverhill, and I did so, and we had a meeting in the Astor House, of Colonel Platt, Mr. Griffith and myself, at which this report was read, and there was then talk of how we could interest some people in it to purchase the mine at that time. Mr. Griffith thought 362
Colonel Platt was a millionaire and could handle the whole thing, but he fell down after a talk and said, "I am sorry, but I have all I can do in connection with these paper mills and I cannot put in a cent; I cannot do anything with it." Then we left Colonel Platt, came down-stairs, talked the matter over and I said I had some friends in Haverhill that I thought I could interest in the property, and after talking the matter over, the next day I went home to Haverhill and I took the report to Mr. John L. Hobson. I gave him the Egan report and the Burnham report and told him of my connection with the whole matter up to that date. I told him
to look the report over and keep it confidentially 363
and if he did not want to go into it, to bring me back the report the next day. The next forenoon he came into my office and asked me if I had any objection to his showing the report to Mr. Dudley Porter. I told him no. Later in the same day, they both came into my office and asked me whether Mr. Egan could be seen. I told them Mr. Egan was in New York, and they asked me if I could get him over and I told them I could and they asked me to go to New York and I went to New York and brought Colonel Egan to Haverhill and introduced him to Mr. Porter and to Mr. Hobson and he had the samples of ore with him and

364 Charles W. Morse.

showed them to them and then he went to Boston, and the trade was made that week to buy the mine. Mr. Hobson, Mr. Porter and myself made a contract with Mr. Griffith to purchase the mine. Mr. Griffith. He went to Boston. We passed the papers between myself and the Haverhill people on one side and Mr. Griffith on the other in Boston. I depended in going into this enterprise and in getting these other people to go in with me on the report of Mr. Egan.

Q. What dependence did you place, if any, on
365 the Burnham report?

A. That he had verified it. Without those two reports I would not have looked into it. The paper shown me is the original agreement between Mr. Griffith, Mr. Hobson, Mr. Porter and myself.

Plaintiff's counsel offers in evidence and reads the agreement between Griffith and Porter, Hobson and Morse, dated the 18th day of December, 1893.

Marked Plaintiff's Exhibit No. 1.

That was executed on or about the date that it bears. The paper now shown me is the subscrip-
366 tion paper between us, under which the parties put up their moneys. It is dated December 18th, 1893. I signed it on that day.

Paper offered in evidence.

Defendant's counsel objects to the offer if it is introduced as evidence of liability to anybody except the individual plaintiffs in the case and as immaterial.

Objection overruled. To which ruling of the Court counsel for defendants then and there duly excepted.

Marked Plaintiffs' Exhibit No. 2.

Plaintiff's counsel reads as signers to the subscription paper, John M. S. Egan, $10,000;

Charles W. Morse, $15,000; John L. Hobson, $15,000; Dudley Porter, $15,009; but omitted the other executions and amounts.

I loaned Colonel Egan the money to make his payment; so I know that he made it; I paid the money to Mr. Porter. I paid my own subscription of $15,000. Mr. Porter and Mr. Hobson's subscriptions were paid. The paper now shown me is a power of attorney from Mr. Porter and Mr. Hobson to Mr. Egan and myself, to receive the conveyances and execute the mortgages and make payments. 368

Plaintiff's counsel offers in evidence power of attorney, dated December 20th, 1893.

Marked Plaintiff's Exhibit No. 3.

I took charge on our side of the actual delivery of the papers and the closing of the transaction. The transaction was completed and the papers passed, in Riverside, California. I met there on the other side when the papers were passed, McIntyre & Taylor. I saw Mr. Sigafus at that time at McIntyre & Taylor's office and at the Glenwood Hotel. I think I had a conversation with Mr. Sigafus about the transaction. The first time 369 I met Mr. Sigafus was in the evening at McIntyre & Taylor's office, and we talked generally about the purchase of the property, and I wanted time to look up the title, and I think they had to have a meeting of the corporation, to authorize the corporation to transfer the property to Mr. Sigafus before he could transfer it to us.

Q. Do you mean to Mr. Sigafus?

A. The old Good Hope Company had to have a meeting to transfer the property which was in their name to Mr. Sigafus, who controlled the stock, it was all in his name, or in the name of his family, but the meeting was held all right and they gave a deed to him and he a deed to Mr. Griffith and Mr.

Griffith a deed to us, and then there were some papers served upon him. There were some papers served upon him by Mr. Maxwell, and Sigafus objected to transferring it without getting a bond to hold him harmless. That was one entire transaction. Mr. Sigafus said that the stock was all in the family. He turned over to us, besides the deeds of the property, the stock-book and all the stock of the old company. He and his lawyers did it; he was the only man outside of the lawyers that we saw.

371 McIntyre and Taylor, in that transaction, acted for both of us. As to the payment of the $150,000 cash. I had a verbal agreement with Mr. Sigafus that the checks should be endorsed over to him, when the deeds were passed, as part of that transaction. All the papers were passed at the same time, as one and the same occurrence. I had instructions from parties in the East, to have the papers all passed and the money paid at one time and I carried the certified checks with me. We went up to the Register of Deeds' office. Mr. Taylor, of the firm of McIntyre & Taylor, and myself went up, he carrying the papers and I carrying the money,

372 and when he deposited the papers I handed him the checks which were endorsed to the order of James M. Sigafus. The understanding between Sigafus and myself, before the deeds were passed was that the checks and the deeds should be delivered simultaneously. The checks were delivered to his attorney, Mr. Taylor. Mr. Sigafus was not there. But the arrangement had been made with him personally. Mr. Griffith was not there at that time. He had nothing to do with the transaction at that time; he and Sigafus were off togother somewhere. The two papers shown me are two checks; one of $90,000 and one of $60,000, payable to the order of myself and J. M. S. Egan, and by us endorsed to James M. Sigafus. I know Mr. Sigafus's hand-

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writing. That is his signature on the back of these checks.

Plaintiffs' counsel offers checks in evidence.

Marked Plaintiffs' Exhibits 4 and 5.

Griffith's name does not appear on either check.

Q. Did the whole of them go on record at the same time?

A. There was one paper that he could not give us, because he had to get his son-in-law's signature, a man by the name of Bird. Mr. Sigafus had to get his signature; but the other papers were all recorded at the same time, as part of one transaction. This paper is one of the papers that was passed at the same time. The defendant was not there at that time; it was all done through his attorney. This paper is the deed of the old company to Mr. Griffith.

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Plaintiffs' counsel offers deed in evidence.

Marked Plaintiffs' Exhibit No. 6.

This is the next one, the deed from Mr. Sigafus to Griffith.

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Plaintiffs' counsel offers deed in evidence.

Marked Plaintiffs' Exhibit No. 7.

This is the next paper, being the deed from Griffith to Porter, Hobson and Morse.

Plaintiffs' counsel offers deed in evidence.

Marked Plaintiffs' Exhibit No. 8.

This is the next paper, being deed from Bird to Porter, Hobson and Morse; the paper that came later and was recorded afterwards.

Plaintiffs' counsel offers deed in evidence.

Marked Plaintiffs' Exhibit No. 9.

376 Charles W. Morse.

This is one of the papers; the mortgage from Griffith to Sigafus, given at the same time.

Plaintiffs' counsel offers a copy of mortgage in evidence dated 28th of December, 1893.

Marked Plaintiffs' Exhibit No. 10.

This paper is the second mortgage.

Plaintiffs' counsel offers in evidence mort-
377 gage from Morse, Porter and Hobson, to Thompson, Fillius and others, dated January 9th, 1894.

Marked Plaintiffs' Exhibit No. 11.

That was delivered at the date of it, I should say. I first made the arrangement as to this $150,000 mortgage, the second mortgage, with Mr. Griffith. That arrangement was first spoken of, I think, when we met in Chicago, on the way to California. Mr. Egan was to have, in the second mortgage, some $54,000. That is half of the $108,000. I think that arrangement was made between Mr. Griffith, Colonel Egan and myself at the Victoria Hotel, in
378 Chicago, after we had started to go to California. I should say the 23d day of December, 1893.

Q. And, down to that time, had there been anything said or done as to giving Colonel Eagan any interest at all, except his interest in the purchase under his first payment of cash?

A. Oh, yes; it had been talked over some two or three days before that in Boston.

Q. When was the very first time that it was spoken of, even, that Colonel Egan should have any interest in the second mortgage?

A. I think the first time was after Mr. Griffith—that is, by myself—was after Mr. Griffith came over from New York, after Mr. Egan had been in Haverhill. The arrangement, such as it was, with Mr.

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Egan was made by me; but it was finally made in Chicago. It was in writing. I do not know where that paper is. Mr. Fillius, of Denver, held the $108,000 note because he was a friend of Mr. Eagan's—to protect Mr. Eagan. I was to have the other $54,000. There was later, as to myself, an arrangement made by which my interest under that second mortgage was to be given up. I never saw Mr. Egan after that day; the day I left him when we bought the mine. As to myself, I think it was in August, 1894. At the instance of Mr. Jones. He had been to California and had seen Mr. 380
Egan and Mr. Griffith and the property had not turned out as we expected, and he said it ought to be turned back and we turned it back. There was some talk that I ought not to have taken the mortgage. Nothing else. I did not have any communication with Colonel Egan about his giving up his interest. I went in and asked Mr. Fillius to assign that mortgage to Mr. Jones, and he did it. Right away. My subscribers in Haverhill did not know that I was to have half of that $108,000. I first learned of it at this same talk in Boston.

By the Court:

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Q. You say you were not aware of it?

A. Not on that date. I knew that I was to have something, but it was arranged in Chicago afterwards—after we had left.

Q. But you knew that they were subscribing on the basis of that amount to be paid for the property?

A. Yes, sir. I never had anything to do with the three $6,000 notes covered by the first mortgage to Mr. Sigafus. They were delivered by Mr. Griffith to Mr. Maxwell; I think Mr. Griffith had one and Mr. Maxwell two. I did not have any conversation with Mr. Sigafus after that.

Q. But they were included in the mortgage that was made to him?

382 A. Yes, sir. I knew that he received the $82,000 note—or his attorneys did for him—and made no objection to not receiving the other three. That was Mr. Griffith's note. This is one of the $6,000 notes.

Plaintiffs' counsel offers note in evidence. Marked Plaintiffs' Exhibit No. 12.

Cross-examination:

I had not, prior to this time, had any experience
383 in mining matters, or been interested in the sale or purchase of mines. I had an interest in a silver mine in Ouray, which originally took me to Colorado. I had Mr. Egan in the Ouray mine. That is where I became acquainted with him. On this occasion his expenses were paid. I think Colonel Platt paid them. I knew Mr. Griffith had the property for sale. I saw Griffith, Egan and Platt at Astor House, New York, about December 1, 1893.

By the Court:

Q. How did you know that he had the property
384 for sale?

A. Because he made the offer of selling it. I did not know whether he owned it, or who owned it, at that time.

By Mr. Wetmore:

Q. You did not know who owned it?

A. No, sir. All I now know is by the deeds. I understand that Mr. Griffith did, in California, make a deed to me, Mr. Hobson and Mr. Porter. And the consideration of that deed is $400,000, and that $400,000 was part cash and part secured by mortgage and notes, as set forth in that contract. Up to the 18th of December, the day when I signed

that contract, I had no communication, written or oral, with Mr. Sigafus. I never saw him until I met him either in Riverside or Perris. I don't remember which. Prior to my making this contract Mr. Egan showed me what has been called the Burnham report, and also his own report, in the Astor House, in New York. That was the first time I had ever seen the Burnham report or the Egan report. I read the Burnham report. I should say I read it all through. I based my judgment on Mr. Egan's report. I took Mr. Egan's word, as represented in his report, as the basis of what I 386
acted upon as supplementing the Burnham report. I did not know Burnham; didn't know who he was and don't to-day.

Q. Did you notice that the Burnham report refers to prior reports made by Burnham?

A. I probably did. I don't recall it. I saw none of those prior reports. There was no map with the report that I saw. I relied on Colonel Egan as to the accuracy of the statements that were made in his report. At the time I executed the contract of December 18th, the subcription paper already referred to had not been filled. I had signed it, but I do not know how many others had. Subsequently
Porter, Hobson and I conveyed to a company. 387

Q. Was any money paid to either yourself or Mr. Porter or Mr. Hobson, after that conveyance from the treasury of the company?

A. I cannot testify as to Mr. Hobson, but there was none paid to me.

Q. You stated that Col. Egan put in some money. I think you said you let him have it?

A. I did.

Q. Did he give you his note for it?

A. Yes, sir.

Q. Was Col. Platt's name on the note?

A. No, sir.

Q. His individual note?

388 Charles W. Morse.

A. Yes, sir; secured by stock in the company.

Q. Secured by a pledge of the stock in the company?

A. Yes.

Q. You took the stock?

A. I took the stock and note and paid him $10,000.

Q. Was the stock put in Col. Egan's name or in yours?

A. I could not say as to that. It was left in the book by the officers of the company; they understood it, because I then went West to live—and I
389 have not the stock myself now—but I suppose the officers of the company have it in my name as collateral.

Q. Then this stock was paid for by you, and Col. Egan gave you a note for $10,000?

A. No. The facts were these: I endorsed Col. Egan's note for $10,000 and took the stock as collateral. When the note became due he could not pay it, and I had to.

Q. Has he ever paid it?

A. No, sir; nor the interest.

By the Court:

390 Q. In your direct examination you spoke of having loaned him some money on his note. When you took this note I suppose you intended to take care of it.

A. No, sir. I loaned the money because I endorsed the note, and got it discounted, and he gave me a note covering it. The original note was given to Mr. Porter, as the others were.

By Mr. Wetmore:

Q. Did you discount any other note?

A. I think I discounted my own note for $15,000.

Q. That resulted in $25,000?

A. Yes, sir.

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Q. As a matter of fact you gave your own note, endorsed Col. Egan's note, and obtained $25,000 from the bank?

A. Yes, sir.

Q. And the corresponding amount of stock was issued to you?

A. No. I took $15,000 of the stock and then endorsed Col. Egan's note for $10,000, for him to take $10,000 of the stock, taking the stock as collateral for the note; and when the note became due he didn't pay it, and I afterwards did.

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By Mr. Wetmore:

Q. You went out to Riverside with Col. Egan with the amount of cash, in the checks which were provided for in this contract with Mr. Griffith, and with the power of attorney that has been read here, for the purpose of making the payment and receiving the deeds?

A. Yes, sir. I think every thing was executed on Saturday, December 30, because there was a great controversy as to whether January 1st was a legal holiday, and we were all afraid that Sigafus wouldn't trade with us. When we got to Riverside 393
Mr. Egan and I went up to Perris to the mine and Mr. Griffith remained behind, and we came back that night or the next morning; and we probably met Mr. Sigafus the next day—the day after I arrived there—or possibly in the evening. I went out to the mine; went down in the mine, presumably all through it. I went with Mr. Egan and Mr. Cheatham, I think his name was. He took us down.

Mr. Jones told me that the company had not made much money and that I ought to give up the $103,000 note. The request that I give it up was verbal. I gave back the note, and had the mortgage assigned to Mr. Jones.

394 Charles W. Morse.

Redirect-examination by Mr. Stickney:

These four letters are in Mr. Egan's handwriting, also (indicating) dated November 13, 18, 19 and 21, 1893. Those papers were received by me in due course of mail, as soon as they could reach me after their dates. These other two I received from Mr. Egan (indicating) in due course of mail. This telegram I received from him, dated November 29, 1893; they are all in relation to this mine. I placed dependence upon the statements in these letters, among other things, in coming to my conclusion to
395 go into the purchase of the property.

Counsel for plaintiffs offers in evidence the letters and telegram identified by the witness.

Objected to by defendant's counsel as not binding upon the defendant, and as immaterial, irrelevant and incompetent. To which ruling of the Court counsel for defendant then and there duly excepted.

Marked Plaintiffs' Exhibits 13, 14, 15, 16 and 17.

396 Cæsar A. Roberts was Colonel Platt's private secretary. This letter, dated November 21 (indicating), is in Mr. Egan's handwriting. This letter dated Perris, November 21, 1893 (indicating), is in Mr. Egan's handwriting.

Counsel for plaintiffs offers in evidence the two additional letters identified by the witness.

Objected to by defendant's counsel as not binding upon the defendant and as immaterial, irrelevant and incompetent.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

Marked Plaintiffs' Exhibits 18 and 19.

JOHN L. HOBSON, called by plaintiffs, sworn and examined:

I have lived in Haverhill, Massachusetts, over 40 years. I am trustee of an estate. I am also engaged in the paper business. I am one of the plaintiffs in this action. I was interested in this purchase. Mr. Charles W. Morse was the first person who brought the matter to my attention. It was in 1893, either the latter part of November or the first part of December, at my house in Haverhill. He had two papers, the Burnham report and the Egan report. These (identifying Plaintiffs' Exhibits A and C) are 398
the papers. They are the identical papers. I have no doubt of it. I read them after he left either that evening or the next day carefully. In coming to the conclusion to go into this investment I depended upon the statements in those two reports. In the Burnham report and in the Egan report. I believed them to be accurate, so far as I could determine about them, and so far as I had any knowledge of mining matters. The next day I made inquiries about Colonel Egan. When he (Morse) passed the papers to me he told me they were reports of a mining property made by Mr. Burnham and Mr. Egan, and that they were both mining engineers. Whether 399
he made that statement voluntarily or as a result of my questions I don't know. The result was we then signed the contract with Mr. Griffith and started a subscription about the same time.

Q. At that time had the other subscribers, all of them, or many of them, come in?

A. Many of them had. I cannot say whether all of them had or not. But we took the responsibility on our shoulders of raising the necessary money. I put in $15,000, my subscription, and I contributed $15,000 in anticipation of the payments by the other subscribers who had not yet paid in their money. This I did before Morse went to California to take the deeds and pay the money. I loaned Egan $5,-

000. I took his note endorsed by James H. Platt, and one-third of his holding in the shares of the company as collateral. The endorsement of Colonel Platt was put on later. Then I, with Mr. Porter and Mr. Morse, executed the agreement with Griffith that has been put in evidence here; and executed the power of attorney. I contributed the payment of my subscription and $15,000, and that $15,000 which I contributed in anticipation of payments by subscribers was afterwards returned to me. So that my payment and interest in the mine was
401 $15,000.

Q. Did you show these same reports to other people who invested?

A. I did, that is to some of them. I mainly put my dependence on coming to my decision on the statements in the Burnham report of the twelve months' mill run; the statements of ore reserve in the summary at the end; and the expense account for those twelve months, as given in detail, which was part really of the twelve months mill run, although stated in a different place in the report. In the Egan report I mainly depended upon the statement with which he opens his report, that his
402 examination thoroughly substantiated—I may not use the exact words—the Burnham report which had been submitted to us; his twenty-five ton test mill run, which he made down there—that is, the result from it; and his confirmation substantially of the ore reserves as given in the Burnham report.

Cross-examination by Mr. Johnson:

Q. Did you rely on any other statements in making your investment than you have testified to this morning?

A. I think the general tone of the report may have influenced me, but the specific statements—with the exception of perhaps the bullion returns,

which I think I omitted to state—attracted my attention.

Q. Nothing definite other than what you have testified to?

A. No, sir.

By the Court:

Q. Do you remember whether Mr. Morse showed you any letters that he had got from Colonel Egan?

A. No, sir; he did not. Referring, of course, your Honor, to the letters that have been submitted 404 here?

Q. Yes, sir.

A. No, sir; I never saw those.

(Witness continuing). There is no signature to the Burnham report, Exhibit "A." I noticed that then. I think I noticed, also, that there was no date. At the time I made my investment I understood that paper spoke from a date subsequent to the twelve months' mill return. I had no more definite idea than that. I don't think I made any inquiries in regard to it. The specific things that I have testified—that I relied on in that report—are contained in what is called a summary, at the end. 405 I understood that that summary was a summary of that paper at the time. I did not look to see, in the sense of verifying, but I read that paper through.

Q. Did you put any reliance in that paper, aside from Mr. Egan's report?

A. The credit that I gave to this paper—this Burnham report—was based on the information that I had from Mr. Morse or Mr. Egan, or both, that this was a report made by a Mr. Burnham, a mining engineer, and the confirmation which Mr. Egan's report gave to this report.

Q. You did put some reliance in that, then, other than Egan's confirmation of it?

406 John L. Hobson.

A. To that extent, I did. I hope I am careful in my investments. If I find that a paper is inconsistent in itself, I do not place reliance upon it, as a paper, without explanation or confirmation from other sources. The twelve months' mill run that I have spoken of as contained in that summary is $57,000 in round figures. I understood that that was a summary of something in the report itself. I read the statement in the report with reference to this mill run. It is in the body of the report, where he has a written statement in regard to the mill run.
407 There is also a statement in the report at another place, in the ore reserves, where he alludes to this same mill run. I noticed that there was a table on page 9 of the report, giving returns of gold bullion from the United States Assay Office. I think it is the only table in the paper giving those returns. I did not look at that paper to see how many dollars there was there. I have since. I think about $48,000. The first date in that table is March 4th, 1890, and the last February 1st, 1892; March, April and May of 1891. Those returns appear on their face to be for a portion of the year 1890, and for the year 1891 and a portion of the year 1892. Those
408 were the only bullion returns given in detail in the report.

Q. If you had noticed that the bullion returns did not bear out the statements in the summary, at the time, you would not have relied upon that statement in the summary, would you?

A. At that time I did not connect these returns as being the identical returns of that mill run.

Q. So that if you had read the reports at that time carefully, you would have noticed that it contained a mistake in regard to that question, would you not?

A. I should have found a discrepancy.

Q. A very serious discrepancy, is it not?

A. Well, I should regard it so. I relied in this

report upon the statement of ore in reserve —the exposed portion, that could be measured according to the recognized principles of engineers. I understood that was a statement of the judgment of the engineer who made the examination. I relied on the judgment of the engineer; in the Burnham report—on Mr. Burnham's judgment. I never heard of him before; only as I heard of him from Mr. Egan and Mr. Morse. His name is not signed. I had before me the report of an engineer as to the ore in reserve that was signed, and whom I had seen. 410

Q. Which did you rely on?

A. I was influenced by both of them. At the time I made my investment I understood that Mr. Egan's report was some time subsequent to this paper that I call the Burnham report. I was buying the mine on the representations as to what his judgment was of the contents of the mine at the time of the examination for Egan's report. I supposed that the Burnham report was made at least a year and a half before that. I relied upon the expense account in the Burnham report as being part of that mill run. I relied upon it as stating the cost to take ore out. That was the only thing that I relied on in making my investment, so far as the 411 expenses of running were concerned.

Q. (Egan's report shown witness.) I will ask you if you read on page 4 of the report that you have called the Egan report, and on page 5, the cost of production which he gives?

A. I suppose I did, for I read the whole report.

Q. You did not rely on this statement, "That the mine is not as expensive as the ordinary mine to work, from the fact that the walls are hard and regular, and that the dip of the lode relieves the stulls from weight," did you?

A. I don't think I did.

412 Q. You did not rely upon his statement that "Miners receive $2.50 a day and trammers $2"?

A. No, sir.

Q. Or upon his statement as to the cost of timber at the mine?

A. No, sir.

Q. Or as to the cost of coal at the mine?

A. No, sir; not specifically.

Q. Nor as to the price of breaking ground on contract and drifting?

A. No, sir.

413 Q. Nor upon his statements of the actual cost of his mill run?

A. Of course, I took the cost——

Q. Did you or didn't you?

A. Certainly, the cost of his mill run was a factor.

Q. Did you rely upon his statement that, "I consider $2.35 a ton a fair amount to be charged to the cost of production per ton through the whole mine"?

A. I suppose that might have had an effect upon me.

Q. But you do not know whether it did or not?

A. No, sir.

414 Q. You mean this Court to understand that you relied upon a statement of cost of production in a paper that had no signature and bore no date, and whose reputed maker you had never seen, and which spoke of a time a year and a half prior to your investment, and did not rely upon a statement as to the cost of production in this mine, or an estimate of it, made by an engineer whose paper, signed and dated, you had, and whom you had talked with about the mine?

A. I mean to say that I relied upon the Burnham report as confirmed by Colonel Egan.

Q. Will you answer that question?

Q. (Repeated.)

415

A. If I may be allowed to use the language of the Court, I should say that I did not analyze these things as I should if I had expected to make a loss upon it, and I was governed by the general statements of these reports. My note for $15,000 advanced was paid after the first of January, 1894, as subscriptions came in. So far as I know, all the money paid by Egan for his stock was loaned by me and Mr. Morse.

Redirect-examination by Mr. Stickney:

416

Q. The term "mill run" has been used here. Which did you intend to apply it to—to that period of about a year where the production of the mine was given, or to the mill run made by Colonel Egan?

A. I was influenced by both of them.

Q. But how did you use the term? You spoke, and I understood Mr. Johnson to speak, of "mill run." We have been using the term "mill run" as applied to Colonel Egan's test there of three or four days?

A. When we have had the Burnham report I have spoken of the twelve months' run, and with Egan's report I have referred to the twenty-five ton test mill run. 417

Q. As to the Burnham report, you mean to use that term about the twelve months' reported product?

A. Yes, sir; where the return was $57,000 and the expenses $15,000, showing a net profit of about $40,000.

By Mr. Johnson:

Q. At what time was that?

A. Twelve months prior to February, 1892.

418 William Foster.

WILLIAM FOSTER, on plaintiff's behalf, by deposition, testified as follows:

I reside at Boston, Massachusetts. I am a mining engineer and metallurgist. I took the prescribed course of the Massachusetts Institute of Technology in the Mining Department. Was assistant to Professor Richards at the Institute of Technology three years in the Mining Department. I have since been superintending the working of mines and smelters and metallurgical works and work for the Government on the Tenth Census. Examination of ores
419 for the Tenth Census under the United States Geological Survey. I have been superintendent of gold and copper mines. The Columbia Mine, in Ward District, Colorado; the Glades Mine, in Georgia, and the Good Hope Mine, in California. Most of my work has been expert examination of mines for prospective buyers in their interest, to examine as to merits of properties whether it was proper investment to buy or not to buy. I was general superintendent of smelting works in Pueblo, Colorado. I have done everything from sharpening the steel in the blacksmith's shop to putting in timbers and striking the drill, loading the holes
420 and running the cars—everything that is done under the ground. In all together I have probably worked two years under ground in that way at the miners' work. Then I have been around it about twenty years of time. Last twenty years mining has been my regular occupation, and I have given my entire time to it. I arrived at the Good Hope Mine the 11th of December, 1894, and immediately took charge. I succeeded Colonel John Egan, and remained until March 5th, 1895. On arrival at the mine I made a general examination of it. I went all over the surface to examine the surface indications; the hoisting plant and mill and all the appliances connected with the mine, and then I went under ground to look through the different old and

new workings. I found the mine opened by an incline, which was the only means of taking ore out from the mine, about practically 500 feet deep, I do not remember exactly to the foot, and from that incline there were three levels; the first one at 250 feet deep, the second one 100 feet deeper—that would be 350 feet—and the third one 100 feet deeper again, making 450 feet to the lowest level, and below that there was a sump for collecting the water. The upper level was practically 1,100 feet long, 250 feet south from the shaft and about 800 feet north from it; 422
and the second level I do not remember the exact distance north, but it was a little over 250 feet south—there was nothing in that; no ore in that; so I did not pay much attention to it. The third level was about 250 feet in length south and 64 or 65 feet north from the shaft. 250 feet south of this incline was another incline which went down as far as the first level, but it was not rigged to hoist any ore; there were no appliances there for hoisting; we simply used it as a passageway for the men, and sent down some timbers there. About 400 feet north of the main incline there was another incline which ran down to the first level; there 423
was no hoisting apparatus on that; it gave ventilation and gave access to the mine for a few of the hands that went down those two separate shafts. There was one block of ground between the second and third level south of the main incline containing three or four thousand tons which Egan had blocked out, but it was not ready to stope at the time I arrived there. The rest of the mine had no ore ready for extraction, practically no ore; there were little bunches here and there which we took out, but no regular stoping ground open. Ore in reserve is ore so opened that it can be measured or taken out anytime as wanted, ore prepared ahead for mining. There was some ore above the

first level both north and south of the shaft, but not in a shape to measure it up and give any accurate tonnage of it. It was small portions mostly where the men found it broken up into small stringers; sometimes it would be in quite a little body, but they were small bunches. Between the second and third level north the ore had not been touched. Between the first and second level the ore had been worked out as far as the levels went. The ore had practically all been taken out 70 feet above the first level; from there to the grass roots the main
425 portion of the ore was in place. It was dangerous ground, a man was liable to lose his life there any minute, and it was never measured to the top, to measure it exactly; in some places it was, but the whole space was never measured by me; they were old stopes that were shaky and it was hard to get a man to go there at all. We had one man nearly killed before I went there, and one man badly hurt afterwards. The ore body in the mine is quartz mainly. Some of the rock surrounding that quartz is soft material decomposed granite, and in some parts of that mine carries value. Between the second and third level south the quartz
426 was in a very fair continuous vein, only in one or two places it was spilt up, but above the first level, above these old stopes, the vein was broken up into a number of quartz veins, varying in thickness from two or three inches, or a stain up to three feet which was the largest I saw there. In the surrounding ground the granite is what we call underground, blocky. It would come out in great big chunks, so that in order to take out eight inches of quartz you were obliged sometimes to take twelve or fifteen feet of waste rock. It would come out itself and it took a great deal of timber to hold it in addition to being quite dangerous to the men. There were no cases in those old stopes above the first level where there was no quartz at

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all. A great deal of that quartz though did not carry gold enough to pay to work; one vein would be good, and sometimes another. You never could tell which one was the one you wanted to follow; you follow it a little way and the value would cease. The main portion of work while I was there was done on the ground between the second and third level south of the main hoisting incline that was on the stoping ground. Then I had a party of men driving a contract on the first level north, and we also in the new ground that we opened put in the stulls and started stopes on that 428
level, and before I came away we also started stopes in the third level north, where we had a body of quartz which showed in the back of the drift. We took ore from all portions of the mine, but nearly all the ore we worked in the mill came from the second and third level south of the incline. I had one or two men on each side of the shaft on first level almost all the time I was there, prospecting around and getting out all the bunches of ore they could. The average bullion value per ton of the ore that I took out of the mine while I was in charge of it was practically $10 a ton; the average value of the ore between the first level and 429
the surface I suppose would be $8 to $9. I got the best ore between the second and third level south of the shaft, the cheapest mining and the best quality of rock. Ore chutes are the richer portions of the vein. The proportion in quantity the ore contained in ore chutes bore to the general ore body of the mine was between a fifth and a sixth. The average per ton was about $10 in the chutes and I should say $5 or $6 outside. Total average value of ore taken out was $10 and a fraction a ton. The average value per ton of the entire ore body of the mine was $7 to $9. I made formal reports to the home office once a month. Three in all. They are accurate statements of what they contain.

Reports received for identification.

The average value per ton in December was $10.49. The average cost per ton of producing was $10.70 a ton. The average value per ton in January was $12.71. Cost of production, $12.01 per ton. The average value per ton in February was $10.84; cost, $12.36. I do not think the mine was worth much of anything when I went there. Leaving out the mill I would not set it at over $10,000.

Cross-examination:

The three mines I had worked before had well-defined walls, and we took out all the vein. In the Good Hope the walls were mostly well defined. The quartz, instead of being in one vein, was in several which branched out from the original, and each one of those veins had its own foot and hanging walls. The character of the wall between the different sections of the vein and between the outermost walls, foot and hangings, we designated blocky ground; it was in large and small blocks which would slip out. It was altered granite. The altered granite between the main foot wall and the main hanging wall was softer; the foot wall was very hard in that mine and the hanging wall soft and shaky. The main hanging wall was not well defined. In places it was. The distance between the hanging and the foot wall varied from nothing to five or six feet. Between the first and second levels on the north end it was nothing but a stain.

Q. State with some definiteness where this was.

A. I cannot give it to you in feet and inches.

Q. Was it north of the shaft, or south?

A. There are plenty of places in the mine in the south end where there is no show of any ore, pinches out to nothing.

Q. Were there any such places north of the main shaft between the first and second levels?

A. Yes.

Q. How many?

A. There was one, quite a long piece of ground; I cannot give it to you, the place, it was all stulled up as though it was good ground, but in fact there is nothing in it as far as you can see on the outside.

Q. How far does this state of relative positions of the walls continue at that point?

A. Well, that is all timbered up and I could not follow it the whole way, but I imagine, from the way the timber is put in there, it is perhaps two or three hundred feet; you can see it at each end and 434
in the middle.

Q. Was there any point south of the main shaft between the first and second levels where this state of affairs existed?

A. Yes.

Q. Whereabouts?

A. About 250 feet at the south end of those drifts it is the case.

Q. Do you mean 250 feet from the main shaft?

A. From the main hoisting incline.

Q. How long a space is there there?

A. I do not know how long. They ran right into dead ground and stopped.

Q. Between the main shaft and the incline or 435
shaft south of the main shaft how much of this ground was there?

A. I should not say there was any. I examined the surface of the ground on first going out there and found the quartz outcropping in a few places; mainly south of the south incline, extending along for six or eight hundred feet along the line of it. There had been a few holes sunk there, I do not know how deep. They were some distance south. The ground, as I walked over it north from the south opening, was largely waste that had been thrown out, taken out from the mine and from prospect holes which had been sunk along there.

The ground was adobe. Going south from the south shaft that is more rocky there, country rock scattered around more. It was rock scattered around and also rock that outcropped there.

Q. How much cropping of rock is there south of the south shaft, and how closely?

A. There are a good many points, I could not tell you how much; a good many points where you can see country rock. I do not think I could follow these outcropping of country rock at all north.

Q. When you arrived at the mine did you find
437 the vein between the second and first level stoped out? Was this stoping clean from the end to the hanging wall south of the main shaft?

A. Yes, the ground was all taken out there.

Q. Had it been stoped clean along the foot wall between the second and first level south of the main shaft?

A. Yes.

Q. You are positive about that?

A. Yes.

Q. How did you ascertain that fact?

A. I went through the stope, the old stopes.

Q. When you arrived at the mine did you find it had been stoped clean to the hanging wall between
438 the second and first levels and north of the main shaft?

A. If I may be allowed to remark, that question of yours cannot be answered. Your definition of hanging wall and mine may be a very little different. What I call the hanging wall in the mine there is as far as the ore pays to take out; strictly a geological hanging wall I do not think it was. That ground was all worked before I went there; I could not see it; I did not see that work. I do not know whether it was stoped clean to the strictly geological hanging wall of that vein, nor whether it was stoped within six feet of it; I do not.

Q. Do you know anything about what was stoped between those two levels and those two shafts?

A. Of course I don't; I was not there.

Q. You testified on your direct-examination that it was all stoped out. Will you please reconcile the two statements?

A. Probably I don't give the right terms to convey my meaning. What appeared to be the ground occupied by the vein once—I do not say there was any vein there—it was taken out.

Q. How do you know it was?

A. I crawled through it? 440

Q. Whereabouts did you go through at the level?

A. I crawled through the stopes.

Q. Did you go through at the level?

A. I went through the level.

Q. At that point was the distance between the foot and the hanging wall excavated hard?

A. Between the first and second it was in places.

Q. Did the level occupy the whole space between the foot and hanging wall?

A. I should consider so; of course I do not know how far the vein may have been there.

Q. Do you know whether it did or not?

A. I would like to be sure of your meaning; I know what I conclude to be your meaning. 441

Q. Do you know whether you did or not?

A. Yes, I should consider it was—in the level it is.

Q. How did you get from the level into the stope when you crawled through it?

A. Climbed up through the mill hole.

Q. Was the opening of the stope you crawled through parallel, or nearly so, with the level?

A. Yes.

Q. How far above it was it?

A. It ran up to the next level above—100 feet.

Q. How near was the horizontal opening of the stope that you crawled through to the level above?

442 William Foster.

A. I did not crawl through any horizontal opening; I went right through the mill hole from one level or down the other; you could go either way.

Q. The only portion of that stope you went through, then, were the mill holes that went through from one level to another?

A. No.

Q. What others did you go through?

A. The places between the mill holes.

Q. What was the nature of those openings?

A. An open stope with stulls in it.

443 Q. Where you went into the opening that was stulled, was the distance between the foot of the hanging walls of the mine excavated clean?

A. I should think so.

Q. What was in the stope at the parts of it that you did not see?

A. I do not know what was in that.

Q. Was there much of this stope that you did not see?

A. No, I should not think there was.

Q. Had the ore been stoped clean from the hanging to the foot wall from level to level south of the main shaft?

444 A. I do not know that. I do not know whether it had been stoped clean along the foot wall throughout the entire stope or for a quarter of it; nor whether it had been stoped clean to the foot wall throughout half that stope or a quarter of it. I do not know whether it had at all in that stope. I do not know whether the ore had been stoped clean to the hanging wall in any vein in that stope.

Q. You have testified that it was entirely stoped in your direct examination between those two levels and between those two shafts; how do you reconcile your direct testimony with your testimony now as to these facts?

A. I consider that they had been stoped out, al-

though I could not be sure of it; I say now, I considered that ground worked out.

Q. Do you now wish to correct your direct examination by omitting that section of the mine?

A. No. As to the space north of the main shaft between the first and second levels, I do not know whether the ore in that ground had been stoped clean to the foot wall throughout the entire space or throughout half the space, or throughout a quarter of the space.

Q. Do you know whether it had been stoped clean at all to the foot wall in that space? 446

A. Yes.

Q. For how much of it?

A. The greater part of it, I should consider; that is my opinion; I do not say I know it.

Q. Do you know whether the ore in this last section of mine, to wit, the section north of the main shaft between the first and second levels, had been stoped clean throughout that section to the hanging wall?

A. I should think so.

Q. Do you know?

A. No, I don't. I do not know whether it had been stoped clean throughout half or quarter of that section to the hanging wall. 447

Q. What examination, if any, did you make to find out as to what had been stoped out of that section of mine?

A. I went through those stopes for the purpose of seeing what there was there, and what there was not there?

Q. Did you go through the second levels north of the main shaft?

A. Yes.

Q. Was that dug out from the foot to the hanging walls throughout this entire course?

A. No.

448 William Foster.

Q. Was it dug out to the hanging wall through any of its course?

A. That I do not know.

Q. Was it dug out to the foot wall through any of its course?

A. I should say so. A large proportion of it.

Q. Which end, if either?

A. A large proportion of it was taken out; the greater portion.

Q. Your testimony as to whether the second level north of the main shaft had been excavated
449 the entire width of the cavity between the foot and hanging walls throughout the entire length has been read to you; have you any corrections to make to it?

A. The level is cut into both the foot and hanging wall in most places.

Q. Do you know whether the ore north of the main shaft and between the first and second levels had been stoped clean to the foot wall?

A. I should consider so. I did not see that work done, but I should consider it so.

Q. Do you know?

A. No. I don't know.

Q. Do you know whether through half of the
450 space it had?

A. I should think it had.

Q. Do you know?

A. No.

Q. Do you know whether it had through quarter of the space?

A. No.

Q. Do you know whether the ore had been stoped clean through this section of the mine to the hanging wall through the whole space?

A. No.

Q. Do you know whether it had through half or a quarter?

A. No.

Q. Was this space that had been stoped between the first and second levels and north of the main shaft all done when you went through it?

A. All that I went through was.

Q. Can you answer that question yes or no?

A. No.

Q. How much of it was open?

A. Seventy-five per cent.

Q. What, if anything, filled the rest of the space?

A. Waste.

Q. You testified that the portion of the mine above the first level south of the main shaft was 452
dangerous to work in; was that true at the time you were out there?

A. North of the shaft.

Q. Was it true south of the shaft?

A. Not very; that was not very bad. It was dangerous to work north of the shaft, on account of the danger of falling rock from the roof of the stope.

Q. Did this rock that was likely to fall, or did fall, in this portion of the mine come from the vein or from the hanging wall?

A. The country rock. It was the hanging wall, the country rock of the country; there was a vein 453
behind the rock which fell and wrecked that portion of the mine and made it dangerous to work in in some places.

Q. From what portion of the mine did you take ore while you were out there, other than the chute or chutes that you testified to?

A. From the north end of the first level and from the streaks of ore above the first level and north of the shaft or the main incline. We did take some above the first level south of the shaft, very small in quantity though; those are the only places except the chutes.

Q. What proportion of the ore that you took was taken from these places other than the chutes?

454 A. Those weights were not kept separate, so I shall have to estimate it. I should estimate it was a tenth came from other portions of the mine than that portion between the second and third level south of the shaft.

Q. What was the average richness of the ore, the entire ore, that you mined and milled while you were out there?

A. About ten dollars.

Q. I call your attention to the items in Exhibits 1. 2 and 3, showing the average production for the
455 months of December, 1894, and January and February, 1895, to be $10.49, $12.71 and $10.84 respectively; is that the average for the entire amount of ore that you took out?

A. Yes.

Q. You testified that the average of all the ore body in the mine would have averaged about $9; what do you mean by all the ore body in fixing that average?

A. I mean all of the ground which I had anything to do with in extracting ore.

Q. Do you mean the average of the ore you extracted?

A. No.

456 Q. What do you mean?

A. I mean all which was opened up by me or before I went there which I could mine.

Q. Now, do you include in that average the ore which you took out?

A. In the $7 to $9, yes, and I include some that I did not take out.

Q. Did you include all that you took out?

A. Yes.

Q. What ore did you include that you did not take out?

A. Ore above the first level north, and also on the third level north.

457

Q. How do you determine the value of that ore in fixing this average?

A. By taking it out, some of it, and testing it by panning and with my eye.

Q. Did you measure the vein throughout this level from which you took these panning?

A. With my eye; no other way.

Q. What was the width of the pay streak at or at the nearest point to the shaft north of it?

A. There was no pay streak; there was no pay in it.

Q. What was the width of the ore streak?

458

A. It varied from three inches to two feet or two and a half feet. I did not take any measurements except with the eye.

Q. Is there any other way of fixing the value of ore in reserve approximately without first ascertaining the average width of the ore and vein?

A. No, I should think there was not. I should think there was no other way.

Q. How did you fix the average value of the ore in reserve or the ore opened up which you have included in your average above the third level north of the main shaft?

A. I did not fix it.

459

Q. Did you include that in your average?

A. Only the samples that you asked—carried nothing—these few samples I took from there and they did not have any gold.

Q. Did you find any gold in the 350 foot level north of the main shaft?

A. Yes.

Q. Exhibit 1, the report for December, do you know whether the statements in that report are true or not?

A. Yes; they are; all of them, to my knowledge.

Q. Will you look at the report for December, Exhibit 1, and say whether it is your testimony that

460 all the statements in that report are true to your knowledge?

A. All but one, and that may be. I don't understand it—that is, one item. The item here put in by Wilson of permanent improvements and water developments; that I don't know about.

Q. What time did you go out to the mine?

A. The 5th day of December.

Q. You have testified in your direct-examination that you arrived there on the 11th?

A. I did get there on the 11th; I got mixed up
461 with my dates; I left on the 5th of March.

Q. Do you know what took place before the 11th of December in the mine?

A. No, except by hearsay.

Q. Do you know how many tons of ore were excavated before the 11th of December?

A. Only from the account; no other way.

Q. Do you know how much waste and quartz was hoisted before the 11th?

A. Only from the account.

Q. Do you know how much of the product of the ore was retorted before the 11th of December?

A. Only from the account. One week's retort
462 appears there, $874.26.

Q. Do you know whether that $874.26 was the retort product of your mine in December?

A. Only from the account. I do not know; I was not there.

Q. It is not true, then, is it, that you know the statements of Exhibit 1 to be true, all of them, of your own knowledge?

A. I expect that is so.

Q. Do you know any of them to be true?

A. Yes, I do.

Q. How many skips were there at the mine at that time?

A. Three; there were only two that were fit for use.

Q. Did they all hold the same amount of ore?

A. Practically, yes.

Q. How many cubic feet of ore did the skips hold?

A. I never measured them to see.

Q. That is three skips to a ton, is it?

A. Yes.

Q. How did you fix that number of skips to the ton?

A. We weighed it. 464

Q. All of it or only a portion of the rock?

A. We weighed it at different times—skip loads.

Q. I notice that the number of tons of quartz crushed is identical with the number of tons of ore produced and does not include the mine waste, what was the mine waste spoken of that was hoisted?

A. Rock carrying no value.

Q. Was the ore sorted before it was milled?

A. Yes. That was the usual method of milling—always as far as I know.

Q. In a true fissure should the foot wall be well defined or substantially so?

A. Yes; I should think so. 465

Q. In a true fissure should the hanging wall be well defined or substantially so?

A. I should consider so; yes.

Q. Do you know whether the space above the first level, both north and south, had been excavated to the hanging wall, where excavations had been made at the time you went out?

A. No.

Q. In your work above the third level, did you excavate to the surface of the fissure, which would constitute its upper wall?

A. Yes.

Q. Completely?

A. Yes.

Q. Are you sure that those show the whole distance between the main shaft and the south shaft?

A. In the work that I did; yes.

Q. Did you so excavate where you took out mineral in other places in the mine than the block south of the main shaft and below the second level?

A. Yes.

Q. You are sure that you did so at all places that you excavated?

A. We took out the whole of each crevice that
467 we worked on.

Q. Completely to the true hanging wall of the fissure?

A. Yes.

Q. When you so excavated above the first level, did you find that at the points where you commenced the excavation in the stopes it had been especially excavated to the true hanging wall of the fissure?

A. Casually, I should say yes. I did not pay much attention to what other people have done. I should consider that to be so, though I don't know.

Q. Do you remember any places where it was
468 not so?

A. No.

Q. When you testified that the distance between the foot and hanging walls in the section of the mine between the first and the second levels was sometimes no more than a stain, did you mean that that was the distance between the fissure walls?

A. Yes.

Q. Do you mean to testify that at any place north of the south shaft and above the first level, there are any places in the mine where the two fissure walls abut so near together that the distance is merely a streak?

A. No.

Q. Was there any other places in the mine where

the true fissure walls approached nearer than two feet other than the section of the mine between the first and second levels and north of the main shaft?

A. Yes. In the third level both sides of the shaft was so; not throughout their entire distance. When they went through with the shaft there was no vein there. They ran out south practically to the end of what is the present tunnel, or was when I left there, and there was very little overhead, a good deal less than two feet, I believe, all the way; I do not believe there was a point where it was between the main shaft and a point 250 feet south. I 470
mean the distance between the walls of the fissure was less than two feet, which would be the quartz crevice. Besides the places on the third level and between the first and second levels north of the main shaft, there was a place on the first level north, at the north end of it where the fissure was as narrow as two feet.

Q. What is the gangue in mining terms?

A. Is it usually meant now as the rock which accompanies the ore in the vein, which is either barren or practically barren of what you are seeking for.

Q. It is the rock in a fissure vein that lies between the walls of the fissure aside from the ore- 471
bearing rock?

A. Yes.

Q. In the portion of the mine that you excavated did you break the gangue clean to the hanging and foot walls?

A. Yes.

Q. Throughout your entire work?

A. Took the whole crevice; all there was.

Q. Can you answer the question yes or no?

A. That answers it.

Q. All the gangue, did you?

A. Yes; all there was in the crevice; we took everything from wall to wall.

472 William Foster.

Q. Is it true that you broke out where the veins split; sometimes one vein and sometimes another?

A. Yes; and we broke just as little of the rock between as we could. That was impossible in most cases.

Q. What was the effect upon the excavation that you made as to its sides—of that sort of work; did it leave the foot wall clean as you worked?

A. It would leave the foot wall of whichever streak we carried on the foot. It would leave the foot out of that streak.

473 Q. Was there a foot wall of the entire mine, as distinguished from the foot walls of separate veins?

A. I don't think there was.

Q. Did you do any excavation that would determine that in your mind, or make any observations that would determine that in your mind?

A. I feel convinced in my mind that there was none.

Q. Was there any hanging wall to the mine, as distinct from the hanging wall of particular veins, when there were several veins?

A. I don't think there was. In distinction to the hanging wall to each stringer that came in
474 there I think there was not.

Q. Did you ever excavate more than one vein where the vein was split?

A. Yes. I found a foot wall under the lowest, and another under the next above it.

Q. Was that foot wall under the next above it continuous up and down, or did it terminate where the vein united again at one or more points?

A. I cannot conceive of a case of its being permanent, continuous—if they are all branches of one vein it is an impossibility.

Q. What breaks are there now under the lowest of the foot walls you have testified to?

475

A. It goes down in steps in some places; goes down in one plain off-set.

Q. Are there any portions where the rocks of the foot wall is not continuous?

A It is the same rock all the time.

Q. When there is a vein underneath a wall which extends between two branches of the vein where it is split, how does that sound compare with the rock underneath the entire vein?

A. It would vary with the distance between the two; the sound would not be always the same.

476

Q. Do you know whether you excavated the rock in the mine where you did work between the exterior upper hanging wall of the mine and the exterior lower or foot wall of it clean?

A. Of each vein we did.

Q. Where there were more than one vein did you?

A. I don't know whether we did or not.

Q. In your work do you know whether you mined the vein which was the best one?

477

A. No, I don't. It is a matter of judgment, and I had to use the best judgment I could on it. A good part of the month of December was devoted to getting all stopes ready; there were not any ready there when I went there, except above the first level. There was no stope in that ground Egan blocked out that I ever saw at all; the stulls were not even put in.

Q. In determining the value of the mines for prospective purchasers did you take into account any prospective value of ground beyond the development at either end of any of those mines?

A. No.

Q. Did you reckon the ore in reserve in making such determination?

A. Yes.

Q. How far down below the last level did you usually reckon ore in sight?

478 William Foster.

A. Right on the upper surface of the bottom of that level.

Q. What do you understand ore in sight means?

A. What you can see and what you can measure.

Q. Does it differ from ore in reserve, and if so, just how?

A. I should not think it differed from the proper reserves.

Q. Would you take into account any ore below the lowest level in the mine in appraising it?

A. No, I do not think I should.

479 Q. Do you reckon any ore below the lowest level as ore in reserve?

A. Not in setting a value for a prospective purchaser.

Q. Do you reckon in setting a value for prospective purchaser, the value of any ore beyond the development at either end of the mine within the mining claim?

A. It would be an exceptional case to cut any figure.

Q. Are the principles of such estimate well understood among mining experts?

A. Yes, I think so. It is not a thing that can be laid down to exact rules; each man has to use the
480 best judgment he has. It is not a recognized principle among reputable mining experts to estimate the value of ground beyond the development. It is not a recognized principle among mining experts to estimate the value of ground below the lowest developments of the mine.

Q. What was the condition of the mine when you took charge of it with reference to the workmanlike manner with which it had been operated?

A. Well, I considered it rather a poor piece of work.

Q. In what particulars?

A. Well, the hoisting incline was crooked and small.

Q. Any others?

A. You could not hoist with the same speed you could if it were straight, and there was no ladderway in it.

Q. Any others?

A. The leves were crooked and poorly broken.

Q. Any others?

A. The balances appeared to be all right.

Q. And as to the excavation, was that done in a workmanlike manner?

A. The stopes, I think so.

Q. Did you think that the development had been carried on in a workmanlike manner at the time of the excavation? 482

A. Yes, with the exception of those points that I have mentioned.

Redirect examination by Mr. Ordway:

Q. You were cross-examined at some length as to the condition of the mine and the work of development between the first and second levels both north and south of the main incline; will you please state as fully as may be what examination or investigation you made, if any, of that region, with reference to continuing work there? 483

A. I examined those portions of the mine as any man would passing through them, and looking at the timbering that was done and the stulls that were put up, all prepared for stoping, and where I could get at it from the chutes, I could see the waste which had been put in for filling when the ore had been taken out, and the waste had been put back there to fill up the ground again, but I was not there to report on the property, and so never took any steps to take that out and be sure that all the ore had been taken out of there, or that ever any ore was taken out, but so far as I could see it was waste matter put in there to hold

484 William Foster.

the ground; most any mining man would say that a piece of ore had been taken out.

Q. Are you able to recollect whether north or south of the main shaft?

A. Both.

Q. Did you make any examination of that portion which lay north?

A. I went through portions of that which were open and climbed around over the stulls from the first down to the second level. The ore had always been taken out, but no waste had been put in
485 there. Portions of that ground north of that shaft had been filled and some it was filled during my stay in the mine between the first and second level with waste.

Q. How were those levels run out there with reference to the side walls, or the hanging or foot walls as they have been called here?

A. They were evidently driven with the idea of getting the best effect from the powder to take advantage of all the slips which were in the rock which is done by every miner to make his work as cheap and rapid as possible. Sometimes both slips were cut—foot and hanging—and sometimes only one.

486 Q. Did you make any enquiries from your predecessor, Col. Egan, or from the foreman at the mine as to the condition of that portion of the mine which laid between the second and third level?

A. Yes, I had a number of talks with Col. Egan, and almost daily with the foreman; I talked with regard to the other parts of the mine.

Q. Did you, during the three months that you were in charge of this mine, take out all of that ore body which you have mentioned as lying between the second and third levels to the south of the main incline?

A. No.

Q. Did you ever measure that ore body?

487

A. No, only by my eye; estimated it.

Q. Why did you not do so?

A. For the reason that it was all I had, and the main thing was to get it all into the mill; I did not care how much there was, but to get it into money value.

Q. What was your object and purpose while you were superintending and running that mine—what was the object you had in view?

A. To try and pay off the back debts and straighten out the mine in a position to go ahead and pay.

488

Q. Did you or did you not endeavor to get as large an amount of bullion as possible at as small a cost as possible?

A. Yes.

Q. Why did you take so small a proportion as you have estimated, a tenth, from the rest of the mine and not the chutes?

A. It was so expensive for timber, and the amount of ore produced so small and the risk to the men, that I simply did a sort of prospective work in the hope that we would strike some big patch that we could last for a week or two weeks. I did not strike any big patch. Referring to the report of December, 1894, I made up so much of that is represented work done and expenses prior to December 11th, when I arrived, from the accounts which were daily turned in to the office from the mine; the result of the hoisting works and of course of the time-book. It was actually made up from them. I had no reason for testifying that they were incorrect.

489

Where there came a split in the vein into two or more veins I selected the one that we should work somewhat by its position to the work which had preceded it in regard to getting the ore and waste out; also by samples and testing, we took the ore of several if they were there. The one that showed

best that looked as if it were getting to enlarge, we would follow that.

Q. In your judgment did the portion of the claim which lay north of the ends of the levels have any prospective value?

A. I had no means of determining at all. That was where I would look for values though.

Q. How about the portion of the claim south of the end of the level?

A. The same way; there was nothing to designate its value without doing work under ground.

491 Q. Was there anything to indicate without work that there was not any prospective value?

A. No.

ELBRIDGE G. WOOD, sworn and examined as a witness for plaintiffs, testified as follows:

I live in Haverhill, Mass. My age is fifty five. I am one of the gentlemen who took an interest in the purchase of this mine.

My business is banking since I was eighteen years old. I was one of the directors and treasurer of
492 the Good Hope Mining Company, and have been all the time. The stock of the Company was issued to the original associates in the purchase in proportion to the amounts of money they paid in for the purchase, and one-eighth of the stock was delivered to Mr. Griffith's assigns under the agreement. The $25,000 for machinery, for the mill, as called for by the agreement, was paid for that purpose. John L. Hobson showed me a paper called the Burnham report, and afterwards a paper called the Egan report. These Exhibits A and C are the identical papers that were there in Haverhill shown to me. I made the memorandum, "Burnham report," on the Burnham report, and the memorandum, "John M. S. Egan report," on the Egan report. I read the

Burnham report first, and afterwards the Egan report. It was on the faith of those two reports combined that I made my investment. Then at or about that time I obtained some subscriptions from different associates. The Burnham and the Egan reports I used in obtaining those subscriptions.

Mr. Stickney: We offer to read the other subscriptions. So far I have only read in evidence Mr. Egan's, Mr. Morse's, Mr. Porter's and Mr. Hobson's. Is there still any objection to these? 494

Mr. Wetmore: Yes; objected to as incompetent and immaterial, and on the ground that the plaintiff cannot in this action recover in a representative capacity for an alleged deceit practiced upon these other subscribers, at least until there is proof that the other subscribers were deceived, so that they could individually maintain an action for deceit.

Mr. Stickney: We will offer the other signatures. As the point is taken that there can be no recovery for the other subscribers, now we offer to prove the fact of their other 495 subscriptions, and the amounts of their subscriptions, and then we shall put in other evidence. Does your Honor admit it?

The Court: Yes.

To which ruling of the Court counsel for defendant then and there duly excepted.

By Mr. Stickney:

Q. Are these the genuine signatures to that paper?

A. They are. They foot up $168,000. My subscription was $15,000.

496 Elbridge G. Wood.

Mr. Wetmore: I further object that it has appeared by the evidence already, that unknown portions of these subscriptions were not made until long after this subscription was closed.

Mr. Stickney: The position as to that is this. The evidence is that, although these subscriptions had not all of them at that time been actually made, these gentlemen went ahead completing the contract of purchase, intending to associate with themselves
497 other parties, and in a very few days they did associate other parties; and at the time that they made the purchase, although these other parties had not actually joined, they were making the purchase for the benefit of those others who should be associated with them. That is the position.

The Court: I shall permit the subscription paper to be read, and I will give you an exception.

To which ruling of the Court counsel for defendant then and there duly excepted.

The names in the report are considered as
498 read.

Thereafter there were two other amounts paid in; $5,000 by John M. S. Egan and $2,000 by Charles E. Wiggin; those amounts were paid in, and for that $7,000 the names do not appear on the paper. They were let in on the same basis, had stock issued to them on the same basis. Their money was all actually paid in and the stock issued, under arrangements in proportion to the exact cash payment.

By the Court:

Q. That $175,000 was the $150,000 paid down,

and the $25,000 which was deposited for the machinery?

A. Yes, sir. I could not give the exact date on which I put my signature there; it was sometime between the 18th, the date of this, and before Mr. Morse went to California. I could not say the date. In addition to my subscription I advanced $15,000 toward the purchase.

By Mr. Stickney:

Q. What papers were submitted to the investors 500
so far as you know?

Defendant's counsel objects as not brought home to the defendant and incompetent; objection overruled; exception by defendant.

A. These two reports.

Q. Look at that list of names and state to the best of your recollection what ones of those subscribers you did yourself procure or confer with?

A. Mr. George H. Carlton—one subscription of $5,000, and a later subscription of $3,000—$8,000. Mr. Henry L. Dole for $3,000 and $2,000. I showed the reports to those two gentlemen. 501

By the Court:

Q. Those are the only ones?

A. The only ones that I can say I showed the report to.

By Mr. Stickney:

Q. What other signatures did you obtain, or with what other signers did you confer in relation to their subscriptions?

A. Mr. George C. Howe, $1,000; Mr. James F. West, $1,000. I think those are all.

502 Elbridge G. Wood.

Q. And where you did not show the identical papers to the subscribers, did you make any statement to them, and if so, what, as to the contents of the papers?

Objected to as incompetent; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. I could not state any definite statement made to them from my recollection at the present time.
503 It is two years and a half ago. The only statements I had were these reports, and so far as I know no statements of the facts were submitted to the associates excepting these reports. I think the cost of the mill was $23,500, and about $1,600 to put the foundation and grading. The papers I produce are the regular monthly returns I received from Col. Egan during the entire period of operations. They begin June 30, 1894. They cover the time from May 30, 1894.

By the Court:

504 Q. Didn't you work the mine before that time?

A. In a crude way, but there were no reports sent up. There were no blanks ready. The operation was slight. But from the beginning of that time I have the complete series of returns from the mine here. These reports give the details of the operation of the mine, and all expenses and every item.

Plaintiffs' counsel offers in evidence the reports above referred to.

Objected to on the ground that they are not evidence of the facts therein stated.

Offer suspended to allow defendant's counsel to examine reports.

505

Cross-examination:

Q. Have you ever, before you invested in this mine, been interested in other gold mining properties?

A. I had some stock in one mine; about $8,000.

Q. I will get you to state what statements of fact in the paper you call the Burnham report you relied on when you made your investment?

A. As I remember now, I should say that it was on what has been called a summary, in the latter part of the report, giving the length of the ore chute, the amount of gold that had been taken out during twelve months, the cost of taking the same out, and various statistics that are in that summary. There was also a statement, as I remember, as to the general character of the mine; that the average production of gold in California mines was $12, and this produced $20, and that by energetic management it should produce $30,000 or $40,000 a month, with a large reserve left. The last statement was a statement of Mr. Burnham's opinion.

506

Q. Did you, at the time you made this investment, rely upon any other statement as to the cost of production of ore out of this mine than what you have testified to in the Burnham report?

507

A. I relied upon it as confirmed by the Egan report.

Q. Did you rely upon the statement of the cost of production in the Egan report?

A. I don't know that I paid attention to the detail of it; I did not go into details.

Q. So that it was the inferences that you drew as to the cost of production from the Burnham report that you relied on in that regard?

A. I couldn't say about that. It was the general matter of the report. I did not go into details in the matter. I paid in my $15,000, I think, the 21st of December. In addition to the $15,000 which I

508 Elbridge G. Wood.

subscribed I advanced $15,000. It was afterwards repaid to me. I handed the $15,000 that I paid in on the 21st of December to Mr. Porter.

Q. And the $15,000 that was paid back to you, from whom was that paid?

A. I don't know. The note was handed back to me. I suppose it was the $15,000 that was paid back by Mr. Porter. It was after the 1st of January, 1894.

Q. After the 1st of February, 1894?

A. I should say not.

509 Q. You don't know whether it was or not? Do you know whether it was after the 1st of March or before?

A. I should say it was before the 1st of February.

Q. Do you know whether it was before the 1st of March, 1894?

A. I should say it was.

Q. Do you know?

A. I cannot tell two years back, from recollection.

Q. You have said that the stock in this company was issued to the associates. Now, when was this stock issued?

A. When the company was organized. I cannot

510 state from memory.

Q. The associates that you have mentioned were no other people, and evidenced by no other paper than that subscription paper that has been put in evidence, were they?

A. They were not; except Mr. Griffith was to have one eighth of it. They were to have the amount of stock in proportion to their subscription.

Q. And that was the paper which evidenced their agreement, wasn't it?

A. Yes, the contract.

Q. Did you act on any other statement or letter or information in making your investment than

511

you have testified to in your direct and cross-examination up to this point?

A. I did not; no, sir. No other statement of anybody, and no other information. This property was afterwards sold by Mr. Porter, Hobson and Morse to the Good Hope Mining Company, the Maine corporation. I could not say as to the date of that sale. After February 23d, 1894, Porter, Hobson and Morse deeded this property to the company. I am now the treasurer. This paper is a deed from Dudley Porter, John L. Hobson and Charles W. Morse to the Good Hope Mining Company, of the mining claims and property in California.

512

By the Court:

Q. What date?

A. The 24th of February, 1894.

The paper is marked for identification Defendant's Exhibit A.—for identification, but is introduced in evidence as Plaintiff's Exhibit No. 21.

513

By Mr. Johnson:

Q. How much stock in the new company did Mr. Porter have?

A. 75,000 shares, representing $15,000; Mr. Hobson had the same amount; Mr. Morse also had the same amount.

Q. When did you show the papers you stated you showed to Mr. Carlton?

A. Sometime between the 18th of December and the 1st of January. I don't know any more definitely than that. No. I should say it was before January 1st. I cannot swear to it. I showed the papers to Mr. Dole at the same time. To the best of my recollection I should say it was before the

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1st of January. I could not give the date of the subscription of Mr. West. That may have been a little later than the 1st of January, a few days. There were no names below Mr. West's when I got his subscription. They came consecutively.

Q. When did you first learn that Mr. Egan, when he represented Porter, Hobson and Morse as their agent, saved out for himself, without their knowledge, a portion of the purchase price of this mine?

A. I think it was in August, 1894.

Q. After that time, and with the knowledge of
515 what Mr. Egan had done in his trust capacity, how much reliance did you place in the reports which you received during his management, as to its correctness?

A. After the 1st of September they were made by Mr. Wilson, the man whom I sent down there, the bookkeeper.

Q. But they were all the time under Mr. Egan's management, up to the middle of December, 1894, were they not?

A. Mr. Wilson was bookkeeper from about the 1st of September.

Q. But so far as the extracting of ore was concerned, and so far as sending amalgam to the mint
516 was concerned, Mr. Egan had charge, didn't he?

A. I suppose so.

Q. How much confidence did you place in your returns from the mine after that?

A. I supposed they were correct.

Q. Notwithstanding the fact that you knew when he was agent that he had been false to his trust?

A. I did not know it definitely. It was a suspicion until September. I knew some time in September. I was out in California early in June. I did not know of it then.

Redirect-examination by Mr. Stickney:

The breach of trust is this interest that Colonel

Egan had in the second mortgage. This is the copy of the certificate of incorporation of the new company.

Witness shown paper.

The plaintiffs' counsel offered in evidence the request for the issue of stock in the Good Hope Mining Company in payment of the subscriptions.

Marked Plaintiffs' Exhibit 20.

The Court: I thought the corporation was organized February 23d, and the conveyance was made February 24th. 518

Mr. Stickney: That is the date, the 23d of February, 1894. Then that request for the conveyance was the 24th of February, 1894. Then the conveyance itself is actually made and the title completed in the company on the 24th of February, 1894, executed by the purchasers.

Plaintiffs' counsel offers in evidence the deed above referred to.

Marked Plaintiffs' Exhibit 21.

All the subscriptions had been paid in and the whole transaction carried out prior to the 23d of 519 February, 1894.

Recross-examination by Mr. Johnson:

There have been very slight changes in the holding of stock since the issuance. Mr. Egan's stock was transferred, 50,000 shares to Mr. Morse as collateral security for a loan, and 25,000 to Mr. Hobson as collateral security for a loan. At the time this corporation was organized the subscriptions had been paid in cash by each of the subscribers to stock to whom stock was issued that day, except Mr. Griffith. I think Mr. Morse sold to Mr. Willett 5,000 shares.

520 Dudley Porter.

DUDLEY PORTER, sworn and examined as a witness on behalf of the plaintiff.

I live at Haverhill, Massachusetts. I am president of the Merrimac National Bank, and I have been president of it since 1887. I was one of the original subscribers to this purchase. It was brought to my attention by Mr. John L. Hobson in the early part of December, 1893. None of the subscriptions had been made at that exact time. Mr. Hobson brought the matter to my attention, and said that he thought it was a very good thing
521 and showed me the reports which gave him his favor, the Burnham report, so called, and the Egan report. (Witness shown Plaintiffs' Exhibits A and C.) I understand it is the report that was shown to me; yes, I read them. The resumé of the two reports influenced my decision. I had great confidence in Mr. Hobson's judgment in the matter and the way the thing came to me. The amount of my own subscription was $15,000. I paid it in in cash. This is the original paper. (Witness shown Plaintiffs' Exhibit No. 2.) I received those payments of cash under those subscriptions from the associates. The latest one was paid, I think it was
522 probably about in January, between the 1st and 10th, probably—the very latest. The bulk of them were made before December 23d.

By the Court:

Q. You think the latest was made between the 1st and 10th?

A. I have no absolute knowledge. It is my opinion.

By Mr. Stickney:

Q. It is your best recollection?

A. Yes, sir.

523

The bulk of them before the 21st of December. The $60,000 check was paid January 6th. They were both my own checks; I can swear they were paid. Before January 6th, substantially the entire amount of the subscriptions had been paid in in cash, I think.

Q. What particular statements in the reports made the main impression upon your mind, on the faith of which you went into this subscription?

A. The statements as to the size of the mine, the length of the vein, the average value of the ore and the receipt of bullion, and the expenses, showing that the mine produced good ore and at light expense.

524

Cross-examination by Mr. Johnson:

Q. Were you in Boston when the agreement with Mr Griffith was made? A. No, sir; the agreement with Mr. Griffith, I believe, was signed by me (the agreement is handed to the witness); I signed in Haverhill.

Q. Do you know whether this paper was delivered prior to Mr Morse leaving for California?

A. I think it was.

525

Q. At the time of the delivery of this paper had the subscriptions of the associates to you been filled?

A. Most all of them; all but a very few had.

Q. Don't you know that they had not all?

A. I don't understand.

Q. Don't you know that they had not all subscribed at that time?

A. There were very few; I know the great bulk of them had.

Q. But don't you know that they had not all subscribed at that time?

A. Yes.

Q. Now, that is an agreement on your part and

on the part of Morse and Hobson to purchase that property in any event, isn't it?

A. I don't know, sir.

Q. Did you understand that, whether your subscription was filled or not, you were bound to take the property?

A. Yes; I understood the subscriptions had been made, and we were satisfied that they would be paid.

Q. Did you understand that they had all been made?

527 A. All but a very few.

Q. Did you understand that they had all been made? Yes or no. You can answer that?

A. I say with that modification.

Q. Do you understand that they had all been made when you delivered that paper?

A. I understood the $150,000 had been made.

Q. You did?

A. Yes, sir.

Q. You swear to that?

A. Yes, sir.

Q. You have testified to certain statements in the reports which you relied on in the resumés. Do you refer to the resumé in the Burnham report?

528 A. The summing up of both reports. The statement as to the ore in sight was an opinion

Q. Did you rely upon the supposed Mr. Burnham's statement of opinion as to that?

A. Corroborated by Mr. Egan.

Q. Which one did you rely on—Egan's computation of the reserve, whose report you had signed before you, or that paper that had no date or signature?

A. One was confirmatory of the other.

Q. And you gave no more weight to the signed one than to the other, did you?

A. I cannot say.

529

Q. You don't know whether you gave more weight to the Egan report than to the other?

A. I can't tell you at this time. I think I have a very clear remembrance of what I did rely on, but probably not clear enough to distinguish between the papers. I relied on the width of the pay streak set forth in the Burnham report. I don't remember that the report said "about two feet."

Q. Did you notice that the report said "a steady width of 18 inches"?

A. I don't remember now.

530

Q. If you had noticed that the Burnham report said "a steady width of 18 inches," would it have modified your judgment of the report?

A. I don't think I knew very much about it at that time.

Q. You testified that you relied on the 57,000 run in one year. Did you suppose that was a summary of some tables in the report?

A. Yes, sir.

Q. And then you looked and found the table, didn't you? Did you notice that the table did not add 57,000?

A. I understand so.

531

Q. And it covered the period, certainly, from March, 1890, to February, 1892, did it not?

A. I understand so.

Q. And that was all the bullion returns in that report, wasn't it?

A. Yes, sir.

Q. And the report was not signed or dated, and it bore evidence at that time of inaccuracy, did it not?

A. I did not notice at the time, and I did not examine the report critically. Probably if I had gone into it critically I would have noticed it.

Q. Did you notice that there was a table of widths in the Burnham report which was supposed

to be summarized in the two feet or the eighteen inches, each of which was stated there?

A. I don't know; I couldn't say now whether I noticed it or not.

Q. Did you notice whether Burnham said that he made his widths every ten feet?

A I presume I noticed at the time.

Q. Did you notice that Burnham said that the entire distance was 2,900 feet; that he made measurements every ten feet, and still did not give in his table but 110 measurements or 1,100 feet?

533 A. No; as I say, I did not examine it critically.

Q. But if you had it would have shaken your confidence in the accuracy with which this copy had been made, would it not?

A. I don't know whether it would or not.

Q. And you did not attach enough importance to care whether it was accurate or not?

A. I believed in the report.

Q. It was like any other paper that was unsigned, undated and unauthenticated, was it not?

A. Not at all.

Q. What credentials did it present to you then?

A. I took it that it was a copy of some report which had been made; not the original report.

534 Q. It was an assumption, without any other facts to go on than you have stated; was it?

A. It was so told me.

Q. But none otherwise than you have testified?

A. No.

Q. You have given here all the representations or statements, letters and things that you saw, upon which you made the investment?

A So far as I remember. These checks were drawn on my account, in two banks. One of those was my own bank, the Merrimac. The amount drawn on my bank is $90,000. I did not have $90,000 on deposit that day. The checks were certified. I filled my deposits to pay that check before the

535

check came back, but not until just before, probably; I can't say exactly. The money was coming in in the meantime. I asked the cashier to certify that check and he certified it upon the request of the directors and myself.

Q. What directors joined with you in making the request to certify that check?

A. I can't say exactly. There were three or four of them. Mr. Hobson was one. Mr. Nicols was another. I cannot say as to another. In addition to my subscription I advanced $15,000 for purchase of mine.

536

Q. Do you know whether these subscriptions were filled and paid before the first of February, 1894?

A. I think the great bulk of them were. I learned that Mr. Egan had this $108,000 note in the summer of 1894. I cannot state the exact time; some time about the first of August. I didn't like it. Egan continued in the management of this mine until the first of September, when we sent out Mr. Wilson. Mr. Egan was nominally the manager. I think he was asked to resign.

Q. How much credence did you place in the reports that you got from that mine after you learned of Egan's breach of trust?

537

A. I placed credence in the reports after Mr. Wilson got there. Mr. Wilson was keeping the books.

Q. Did you understand that Wilson attended to the clean up?

A. I don't think I did.

Q. You did not understand that Wilson attended to the taking out of the ore, did you?

A. No, sir.

Q. I will get you to tell this jury how much an ounce of ore is worth, if you know.

A. Somewhere in the neighborhood of $20?

Q. That is, if this ore ran $20 to a ton, there was

not but an ounce in a ton, and it was an easy matter to get that away from the mine, wasn't it, by a man who was not honest, without your knowing it?

A. I am not familiar with the methods to know.

Q. It is not a large package to carry, is it?

A. I think not.

Q. And you did not take any pains to put a check on Egan, except a bookkeeping check, after you learned of his breach of trust, did you?

A. I had nothing to do really with the management. I was president of the company at that
539 time, and am yet.

Redirect-examination by Mr. Stickney:

By the Court:

Q. What was said to Mr. Morse about his $54,000?

A. I have no knowledge of it myself. I had no conversation with Mr. Morse about it.

By Mr. Stickney:

Q. Mr. Jones had that in his hands, too, hadn't he?

540 A. Yes, sir,

WILLIAM H. GRIFFITH, sworn and examined as a witness for the plaintiffs:

I live in Leadville, Colorado. My residence has been Denver, Colorado, since the fall of 1886. I manage two daily newspapers, *The Herald-Democrat* and the *Evening Chronicle*. In the month of May, 1893, I first met Mr. Sigafus in the Hallenbeck Hotel, Los Angeles. Mr. Maxwell brought Mr. Sigafus to my room and introduced him to me, and told me this was the owner of the Good Hope Mine, a report upon which I had been given some

time before, and shown to some gentlemen in Los Angeles, and that Mr. Sigafus wished to sell. I asked Mr. Sigafus if that was correct, and he said yes, that there was then a bond out upon the property which expired upon the 17th day of that month, and that after that he was willing to deal with me.

Q. What was said as to your being yourself the purchaser, or as to what you would undertake to do in relation to sale of the mine?

Mr. Wetmore: I object to this testimony as immaterial and incompetent.

Objection overruled: exception by defendant. 542

(Question repeated.)

The Court: You had better ask what the conversation was.

Q. What was the whole conversation as to your connection with the sale of the property?

A. I told Mr. Sigafus at that meeting that I knew some people in Los Angeles to whom I thought the property could be sold; that they were people of standing in Los Angeles and claimed to have connections in the East ready to purchase the property 543 immediately. A contract was drawn up between Mr. Sigafus and myself and dated—my recollection is—May 22d, 1893, the contract calling for the sale of the property to me for $260,000.

By the Court:

Q. In that same interview you entered into a contract with him?

A. I am not certain as to whether it was that interview, but it was in the two interviews we had. We had two interviews.

544 William H. Griffith.

By Mr. Stickney:

Q. How far apart were they?

A. Within a week.

Q. So that the arrangement was concluded immediately?

A. Yes, sir.

By the Court:

Q. What shape did your contract with him take?

A. My contract called for the purchase——

545

By Mr. Wetmore:

Q. Was that in writing?

A. Yes, sir.

By the Court:

Q. Have you got it?

A. No, sir; I have not my copy now.

Q. Let us see what it was?

A. The contract called for the consideration of $500,000. Payable, I think, $100,000 in thirty days——

546 Q. Do you mean to say you were to pay him $500,000?

A. No; he was to pay me back $240,000 of it. The consideration stated in the contract was $500,000.

The Court: I guess we had better have that contract. Are you willing to take his statement as to the contents?

Mr. Wetmore: No, sir.

The Court: All the material thing about it is then that there was a contract made by which you acquired the right to purchase that mine?

The Witness: Yes, sir.

By Mr. Stickney:

Q. What did you afterwards do? Without going into details, did you make different efforts to sell that mine?

A. Yes, sir; the efforts failed and I wrote Mr. Sigafus to that effect: that the contract was void—ended.

Q. Who was the first person that you came into communication with in relation to the purchase, of these Haverhill people?

A. John M. S. Egan, Charles W. Morse and Colonel James H. Platt. I met them in Denver, November, 1893. Prior to that time I had sent to Colonel Platt a report upon this property, a report presumed, or which I understood to be a report of Mr. Burnham, a mining expert. I received it from Mr. Sigafus. I sent it to Colonel Platt. 548

By Mr. Stickney:

Q. Was that this paper, or was it a prior one (showing witness Plaintiffs' Exhibit A).

A. To the best of my recollection that looks like the paper. 549

By the Court:

Q. When did you get that report from the defendant?

A. I received that report from the defendant in the month of September or October, 1893. I sent it to Colonel James H. Platt at Denver.

Q. Then, at that time?

A. Yes; as soon as I received it.

Q. When did you see it next?

A. I next saw it in the hands of John M. S. Egan. That is, I believe I saw it. I saw a typewritten report which Colonel Platt—which looked like the report I sent to Colonel Platt.

Q. Confine yourself to answering questions.

Mr. Stickney: Your Honor, I think the witness will keep strictly within that.

The Court: No; it was not responsive.

Mr. Stickney: The witness intended it to be so.

The Court to the witness): Confine yourself strictly, answering questions that are put to you.

I have had three copies of the Burnham report. I received one from Walter S. Maxwell, one copy from J. Everett Bird and one copy from Mr. Sigafus. I received the last one in September or October, 1893.

By the Court:

Q. When did you get those?

A. I received the ones from Maxwell and Bird in May, 1893, and the one from the defendant in September or October, 1893. One of them I gave to the gentlemen who were endeavoring to sell the property on the first bond, and the other one I left in a railroad train in Pennsylvania by mistake.

The Court: I think, Mr. Wetmore, you might fairly state whether your client denies that he delivered a typewritten report.

Mr. Wetmore: No, sir; he will not deny this. Mr. Griffith asked of Mr. Sigafus if he could get him a copy of this report, Sigafus not having it. Sigafus went to Doran and asked him if he had a copy, and he mailed it to Los Angeles, which is the last we know or have heard of it. That is the fact upon our side. Whether this particular typewritten copy is the one which found its way through the channel of Mr. Platt, and is the one he is referring to, we do not know.

From an examination of the contents of the report handed me. I would say that that is a copy of the Burnham report given me by Mr. Maxwell and Mr. Bird, and sent to me by Mr. Sigafus; whether or not that is one of the copies I actually received I cannot say positively, though it looks like the one I received from Mr. Sigafus. The contents of it compares with my recollection of the paper. If this is the exact identical paper it is the one that was in Egan's possession. I met Col. Egan and Mr. Morse and Mr. Platt at the Oxford Hotel in Denver in November, 1893. If this is the identical paper, 554
it, or a copy of it, was there present. Colonel Egan asked me if I knew anything personally about the mine. I said I did not; that the report which I had sent to Colonel Platt was a report said to be made by Mr. Burnham, a mining expert, who stood high, and from all I knew the report was correct. Morse said, if the report was correct, he believed he could find a purchaser for the mine. It was then agreed between us that Colonel Egan should come to California and examine the property, and if it was found to be as set forth in that report, that they would undertake, Colonel Platt and Mr. Morse, to find a purchaser for it back East. Colonel Egan
came to California. I met him at Riverside, Cali- 555
fornia, and took him to Perris and from there to the mine. I introduced him to Mr. Sigafus, whom I had seen prior to that time, after going from Denver, and told him that Colonel Egan was the expert sent down by Colonel Platt and Mr. Morse for the purpose of examining the property, and that they represented Eastern capitalists who were able to purchase the property, and asked him if he had any objection to Colonel Egan making an examination, and he said not, and the property was presumably turned over to Colonel Egan for examination. It was about the middle of November, 1893. I remember Mr. Sigafus just telling Mr. Egan that

556 he could examine the property in his own way, do as he pleased with it. I think I was there during the examination about four days and then I went to Los Angeles.

By the Court:

Q. You left there before the examination was completed?

A. Before the mill-run was completed.

Witness continues answering Mr. Stickney:

557 Three or four days was the length of my stay; from three to five days. I believe mill-run had begun or was to begin morning I left. I helped Colonel Egan crush the samples out, in the office of the mining company. I did that in the office of the mining company The samples were brought up from the mine, and put in the office every time they were taken. If we came up at noon or in the evening, the samples were brought up with us and they were taken to the office, my recollection is, by Col. Egan or by Mr. Cheatham, Mr. Sigarfus' foreman. Mr. Egan had the key to the office, my recollection is.

558 Q. Did Mr. Sigafus in your presence say anything as to the key or the custody of the office?

A. I think he gave the key to Mr. Egan in my presence, that is my best recollection.

Q. Did he tell you, or did you learn from any other source that he had another key?

A. No, sir.

I have stated that I assisted to some extent in crushing the samples. The samples were all wet, and there was an old-fashioned fireplace there. Before being crushed in this hand crusher it had to be dried, and we had a piece of sheet iron, and we would put two samples, separating them at the time upon this sheet iron, and they would stay there until they were dried and then we would take them

into the next room and put them in the crusher and crush them out, and Mr. Egan, after getting them down into smaller samples, would tie them up in a sack. This is all I had to do with them.

The sacks were tied with a string at the end, not sealed. Mr. Egan was in charge. So far as I know nothing dishonest was done by any one. In two or three days Egan came to Los Angeles and we took a train to Denver. I knew nothing whatever about Colonel Egan's report. All I heard from him was that he was pleased with the mine, and he would confirm the Burnham re- 560
port, until Colonel Egan and I came to New York and met Mr. Morse. After Colonel Egan had had his talk with Mr. Morse the two of them came to me, and Mr. Morse informed me that he was pleased with Colonel Egan's report, and that he was ready. I never saw the report until November, 1894. Mr. Wood showed it to me in Haverhill in the fall of 1894.

Q. Did you ever say or do anything to induce Egan to make a report otherwise than as he actually believed it to be?

No, sir.

Q. Did you ever say or do anything to induce 561
Egan to make a report otherwise than as he actually believed it to be?

A. No, sir.

Q. Did you ever have any knowledge or information that led you to believe or expect that he made that report other than upon his best judgment of the merits of the property?

A. No, sir. We left Denver the day after Thanksgiving.

Q. Then what was the first actual step taken in the negotiations?

A. I spoke to Colonel Platt, who was here at the same time, at the Astor House, about December 1st, and a meeting was arranged between Col. Platt

562 and Mr. Morse and Mr. Egan and myself in Col. Platt's room. Col. Platt then informed me that he could not undertake to handle the property; that he had business of his own on his hands which required all his attention, and that he would have to tell me that he could not touch it. That was presumed to settle the business dealings between Col. Platt and me.

By the Court:

563 Q. Before you came East did you have any contract with the defendant?

A. Yes, sir; I had in my possession a contract for the property. It was made August 17th, 1893.

Q. You spoke of having made one, and you tried to get some people interested in it, and then that was abandoned?

A. Yes, sir; that had expired. Then I made another one on the 5th of July, 1893, and that one was to expire on the 1st of September, 1893. In the month of August, 1893, I returned to Los Angeles and met Mr. Sigafus at San Bernandino, and he gave me the third contract, dated August 17th, 1893.

564 Q. What I wanted to get at was, whether you had a bond or contract for it when you came on East with Mr. Egan?

A. Yes, sir.

Q. When was that dated?

A. August 17th, 1893. I never knew Colonel Egan until I met him that morning in November, 1893, in Denver. I knew of him. After Colonel Platt dropped out of the affair, Mr. Morse informed me that he believed he knew some people to whom this property could be sold. That he had some people to whom it could be sold; and he said he would take Colonel Egan's report and Mr. Burnham's report, and go across to Haverhill and see the

people. I believe he mentioned Mr. John L. Hobson and Mr. Dudley Porter. He went to Haverhill, leaving Mr. Egan and I in New York. He returned in a few days, and said he could sell the property. He asked me how much of the profit I would give to him and Colonel Egan. I said that was a matter depending entirely upon the price realized. He said he could sell it for $400,000, and that he and Colonel Egan wanted two thirds of whatever the profit was; and that was agreed upon at the time—that they should have two thirds of profit. It was an oral agreement. They then left me and went to 566
Haverhill.

Q. He wanted what share of the profits?

A. He wanted two-thirds of the profit for himself and Mr. Egan. That was the first time that there had been any such thing mentioned. This was after examination made and report delivered. Mr. Morse told me that he had Mr. Egan's report. In a few days they wired me to come to Boston. I went to Boston, and there I met Mr. Egan and Mr. Morse, and they told me they were making the sale in Haverhill. I stayed there, I think, for about a week, and in that time the sale was made in the name of Charles W. Morse, Dudley Porter and John L. Hobson. Of those people I met Mr. Hob- 567
son; and I also met Mr. Jones; Mr. Jones came to the hotel when the deal was finally consummated and talked over the details of it, and my recollection is that Mr. Jones drew up the agreement. I am not positive whether I did or whether he did. At any rate, the agreements were taken down to Haverhill, and Mr. Porter and Mr. Hobson and Mr. Morse signed them in Haverhill, and then they were brought back to Boston, and I signed them there, and they gave me my copy. I next met Mr. Morse and Mr. Egan in Chicago and went on to California with them. I met Mr. Sigafus at Riverside. I told Mr. Sigafus the purchasers were Mr. Morse

568 and Mr. Porter and Mr. Hobson, representing, as I understood, a number of people in Haverhill.

(Papers shown witness.)

This one, dated the 5th day of July, 1893, is the contract I made on that day, and this paper, dated the 24th day of August, 1893, is a new contract or extension—whatever you may call it.

Marked Plaintiff's Exhibits 22 and 23.

I told Sigafus at Riverside that there was to be a
569 cash payment of $150,000 to him, and $100,000 paid in six months, secured by a mortgage upon the property to him. The three notes of $6,000 each secured by the first mortgage were to go to me, they were to be made in Mr. Sigafus's name, and he was to endorse them without recourse and turn them over to me, and he did so. I informed him that the certified checks for $150,000 were there, in the possession of Mr. Morse and Mr. Egan, who represented the people as attorneys; and they were ready to turn them over just as soon as the papers were signed and delivered; that I wanted him to make the deed to me and I would give the mort-
570 gage, and I was going to transfer to these other people. The papers were made in that way, and Mr. Morse and Mr. Egan endorsed the checks and delivered them over to Mr. Sigafus themselves. I did not see it done. Sigafus told me that Morse and Egan had delivered him the checks and he had them. Then the papers were passed, all drawn and executed and delivered as part of one transaction.

Q. When you left the mining property what, if anything, did Mr. Sigafus say to you as to how or on what terms you might sell?

Objected to by defendant's counsel as incompetent; objection overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

571 A. On the way from the mine at Perris, the morning I left the mine, Mr. Sigafus told me that I could sell the property on the best terms possible. I said, We cannot get all the money down as my contract calls for, but I believe these people have money; and I told him about a telegram that Colonel Egan had sent to Morse. He said, Make the best terms possible and he would stand by it.

Cross-examination by Mr. Wetmore:

572 I had three of these Burnham reports. One I lost in the cars, one I mailed to Colonel Platt and one I gave to a man in Los Angeles. I may have had four; I may have received two from Mr. Maxwell; I don't know, but I remember distinctly one. I delivered the one in Los Angeles to Mr. Ludovici. The Burnham report, so-called, this document that we have had here, refers to "my former report," in substance, dated January 1st, 1891. I never saw that report. Further on this Burnham report says, "in former reports," using the plural, "I have made certain investigations." I saw but the one report of Mr. Burnham; I don't think I compared the copies. It is just from my recollection of the 573 contents. Two of the reports that I remember of had maps, not attached to them, but delivered with them, and one of those reports I am certain was given me by Mr. Maxwell. I am not certain who gave me the other one. One had a blue print map with it and the other had a photograph and map, if I remember correctly.

Q. Did the one which you say Mr. Sigafus mailed you have any map to it?

A. No, sir; not that I remember of; I wrote or telegraphed to him for it. I received the report which Mr. Sigafus mailed to me, I believe, at Chicago. I think I mailed it to Colonel Platt from Chicago. I don't think I had any map at the time

574 I received that report. The report I lost had a map with it. I never had a map after I lost the report. I don't know whether I ever had any photographs after that or not. I lost this report in the cars, between Mercer, Pennsylvania, and Pittsburgh, in the month of September or October.

By the Court:

Q. I think you said it was September or October you sent it to Colonel Platt?

A. Yes, sir.

575 *By Mr. Wetmore* (witness continues):

I mailed it to him at Denver. In the latter part of October Mr. Sigafus wired me to come to California. I remember distinctly that, because during my absence in California my father died. I received the report from him and sent it to Colonel Platt before I went to California on that trip. Mr. C. A. Luckhardt, of San Francisco, is a mining engineer of high standing; I paid him to examine the mine and report to me; he made this examination the latter part of June or the first two or three days of July, 1893.

576 Q. Do you remember on any occasion asking Mr. Sigafus if he could let you have a copy of the map or of the Burnham report, to aid you in interpreting this report of Mr. Luckhardt's?

A. I never remember asking him for anything to enable me to interpret Mr. Luckhardt's report; no, sir. In November, 1894, I told Mr. Wood, the treasurer of the Good Hope Company, regarding that report, and he asked me if I would send it to him, and I said yes, and when I returned West I mailed it to Mr. Wood at Haverhill, Mass., and have never seen or heard of it since. That letter to Mr. Gibson was written before I met Mr. Sigafus, but I had met his son-in-law, Mr. Bird.

577

Defendant's counsel offers in evidence the letter above referred to, dated May 10th, 1893, and it is marked Defendant's Exhibit B.

The Witness: I would like to make a statement regarding that letter. That letter was written after my first interview with Mr. Sigafus, because I then agreed upon the terms of the option he would give me after the expiration of the contract he then had out. I saw Mr. Sigafus once or twice before the first bond was signed. I saw him on the 5th day of July.

578

By the Court:

Q. One thing I do not understand. The price of the mine was $230,000?

A. Yes—$232,000 at last. He took $2,000 for taxes out there afterwards.

Mr. Wetmore: If the Court please, if you notice the bond—the payments were to be made according to the bond, so that the cash would have been quicker than was determined by the papers that passed at the sale; consequently, Mr. Sigafus would have received a mortgage for $80,000, and then his cash, $150,000, which was a little larger than the old cash payment that was to be made, but less than the second one. Now, as Mr. Sigafus consented to defer his payment, and that required a mortgage of $80,000 to secure it, he said that he ought to have the $2,000, which was a tax, so as to put it in the same condition as before. That was allowed by the parties, and, therefore, his mortgage was $82,000, being $80,000, plus the tax, and $150,000, which made his price. That is correct?

579

The Witness: Yes.

580 William H. Griffith.

By the Court:

Q. Then the profit that you were to get was the $18,000 which was included in that mortgage and the $100,000——?

A. $150,000, the second mortgage. This second mortgage was executed some time later. The 9th of January, or somewhere about there. It was not drawn and executed as part of this transaction. The reason why Morse and Egan got more than the two-thirds was that they gave up, each of them, the $6,000 note which I had given them of the
581 three $6,000 notes.

Redirect-examination by Mr. Stickney:

Q. Then this letter that Mr. Wetmore showed you, dated at the Hellenbeck Hotel, May 10th, the words, "Hellenbeck Hotel," are they engraved, as is sometimes the case with hotel paper?

A. I think they are typewritten. Both Mr. Ludovici and I were living at the Hellenbeck Hotel.

Q. Is your recollection perfectly clear whether it was written at the hotel or in his office?

A. My recollection is that all the correspondence that took place—I had never met Mr. Gibson at
582 all, and I did it through Mr. Ludovici.

Q. Look at those words (showing witness Defendant's Exhibit B); that is plain typewriting, isn't it?

A. Yes, sir.

Q. It is not ordinary hotel paper?

A. No.

Q. Not paper that is used at the hotel?

A. No: it is not the kind of paper that the Hellenbeck Hotel uses at all.

Q. To your best recollection, then, where was this written?

A. In Mr. Ludovici's office.

Q. I call your attention to these words: "On

583

hearing from you I will have the option made direct to the party you may designate by the owner, providing you send out a man immediately to examine, with assurance that if the mine is found to be as represented in the accompanying report they will buy the property at the stipulated price." What conversation, if any, had you had with Mr. Sigafus, prior to writing this letter, as to the matters you stated in that paragraph?

A. I had at least one, perhaps two conversations before I wrote that letter, and I had a verbal agreement with Mr. Sigafus in regard to the bond that 584
he was to give me when the other expired.

Q. And was that verbal understanding substantially put into the written bond?

A. It was put into the written bond on the 22d day of May.

Q. But it was a few days before the written bond was actually executed?

A. Yes.

I think perhaps the second mortgage was executed at Riverside. It was drawn up in Los Angeles, and I think it was executed in Riverside. After the execution of the other papers.

Q. When Mr. Jones went out and met Mr. Morse 585
and Colonel Egan in relation to the surrender of the Fillius mortgage note did he make any charge of fraud against either of them, as far as you knew?

A. No, sir. All he said in my presence, that I remember, was that the people at Haverhill thought that the property had not turned out as it should turn out, and that they ought to give up the stock and notes.

By the Court:

Q. You think he put it mildly?

A. That is it. I think he let them down very easily.

586 Q. Mr. Maxwell, you say, made a claim that something was coming to him out of the deal in the shape of commission. What did he say, if anything, as to Mr. Sigafus owing him anything?

A. He said it was coming from both of us; that he claimed commission off of both of us, and that he had papers prepared to sue both of us if we did not settle with him, and prevent the deal.

By Mr. Stickney:

587 Q. It is your present recollection that that was said at that time in your presence?

A. Yes; something of that character; I know it was very general.

Recross-examination by Mr. Wetmore:

Q. I understand you to say, then, now that Mr. Jones did not say that the reason that they were to give up the note was that Charles W. Morse was one of the partners in the deal, and that the people in Haverhill said Mr. Morse was not making a dollar of commission in the transaction, but merely
588 said that the mine had not turned out well, and so on?

A. Mr. Jones did not tell me that in the presence of Mr. Morse and Mr. Egan. He told me things privately different from what he told me in their presence.

Q. These are the two notes, are they, to which you have referred—those two $6,000 notes (handing witness papers)?

A. Yes; they look like the notes.

Q. That is your signature?

A. Yes; that is my signature.

The two notes are offered in evidence.

Marked Defendant's Exhibits C and D.

589

Plaintiffs' counsel offers in evidence the original returns of receipts and expenses from the mine sent to Haverhill, the first one being for the month of June, 1894, and others for each month down to, and including, May 20, 1895.

The package of returns referred to is marked Plaintiffs' Exhibit 24.

Plaintiffs' counsel offers in evidence a summary or statement compiled from the reports, subject to correction.

590

Marked Plaintiffs' Exhibit 25.

———

EDMUND H. WILSON, sworn and examined as a witness for the plaintiff.

By Mr. Stickney:

I live at the Good Hope Mine. I have been there from the 6th or 7th of September, 1894. I came from Haverhill, Massachusetts. I had no occupation during that year. I was sent out by Mr. Porter and Mr. Hobson and others to look after their 591
interests. I was cashier, kept the books, took charge of the bullion drafts, deposited the bullion or shipped it, drew all the checks and audited all bills.

By the Court:

Q. You were the financial manager there?

A. Yes, for a certain length of time. Of course, my business changed while I was there.

By Mr. Stickney:

I did not have anything to do with the actual operations of the mine. I did with the milling.

592 Edmund H. Wilson.

From about, I think it was, the first of March on to the receivership I handled all amalgam after it was taken from the batteries; cleaned it, and either retorted it or helped retort it, shipped it, received the drafts, and saw that the amounts were entered on the books, and the drafts deposited. If we ran nights Jepson was night mill man, and he worked on the crusher some, and helped clean up the batteries once a week. Egan was there from the time I arrived until, I think, the 12th day of December. Mr. Foster came out then. He stayed out until 5th
593 March. I was in charge from time Foster left until the 20th of May. At that day Receiver took possession. During the period that I was there, from September, 1894, to May, 1895, I made out regular returns. They were correct, according to the books and accounts. I kept books and accounts during that time, and I have personal knowledge. They were kept accurately. Those books are here in the room. During the Foster period, from December, 1894, to March 5th, 1895, those are the figures of the items stated therein as they have been compiled from the books kept by me (showing a paper).

594 The paper referred to is offered in evidence, subject to correction.

Marked for identification Plaintiffs' Exhibit 25.

Plaintiffs' counsel reads from the above exhibit the following:

The Foster period, December, 1894, to March 5th, 1894:

Tonnage, 1,601.

Bullion, $18,074-89.

Cost of production, $18,088.51.

Value per ton, $11.29.

Cost per ton, $11.30.

595

The Wilson period from March to the Receivership:

May 22, 1895.

Tons, 1,224.

Bullion, $15,609.95.

Expenses, $15,203.65.

Value per ton, $12.75.

Cost per ton, $12.43.

While I was there under Foster's and my own management, I don't know that the greater portion ofthe ore was taken from the lower level north (the old third level there when Egan left), but the greatest value was, I think; and also from B level, started during Mr. Foster's administration.

596

Cross-examination by Mr. Johnson:

I knew nothing about mining when I went out there.

Q. Now, if Mr. Foster has testified that he did not extract any ore from the third level north of the main shaft, who is right, you or he?

A. I suppose he is.

Q. So that you do not mean to testify that you know anything about it, do you?

597

A. I did not say I did, only so far as I could learn, without being in the mine very often, and that is a fact.

Q. How much mining property do you own in California now?

A. I don't own a dollar's worth.

Q. And you have not bought any mine since you went out there?

A. No, sir. I have got some little claims there—$200 or $300.

Q. Have you bought any property, either alone or in company with others, since you went to California?

598 Edmund H. Wilson.

A. I have bought one, or part of one.

Q. Did you ever ship any bullion from any place in California to San Francisco, or any other place, in your own name?

A. Yes, sir; from Perris. The amount in the accounts is correct, with the exception of one lot. That I shipped not long ago. When I went out there Mr. Egan was in charge, until about December 12th.

Q. You did not assist in any clean up before that time?

599 A. No.

Q. Do you know whether the expenses during the Egan management, from your same books, show that a portion of this $60,000 was expended for machinery and plant?

A. They do show that there were such things purchased.

Q. Mr. Egan's estimate in his report of the cost of extracting gold from this mine is $2.35 a ton. How do you reconcile that with your result, as shown by your books?

A. I don't know anything about the mining below. I can't figure that; I don't pretend to.

Q. I call your attention to the cost of production
600 in the Egan report, on page 4, and, especially, at the conclusion of it, "Allowing the proportionate cost for sinking, drifting and timbering, I consider $2.35 a ton to be a fair amount to be charged to the cost of production per ton thoughout the mine. I have said nothing about the mill so far, as far as the Bryan mill now in use has been ample for the purpose it has been used for by the proprietor, namely, for the treatment of ore extracted in development, which I find to be six tons a day of ten hours, at a cost of a dollar a ton." So that the cost of mining and milling, as reported by Mr. Egan, was $3.35. Now, on your testimony, you have shown that the cost of mining and milling under

the management of the company varied from $10 to nearly $13, and kept pace with the amount of gold that came out of the mine. How do you reconcile the estimate of the expert who examined the mine and the actual cost of the production as you managed it?

A. I don't know as I can reconcile it. I did not manage it but a very short time, and it was run a good while. In three months, or two and a half months, it would be very hard for me to reconcile any statement of that kind—that runs way back in the years. 602

Q. In your management how do you account for the excessive cost of managing this mine?

A. I do not know. I have got my books; that is the best I can give. They are satisfactory to me all right.

Q. You never managed any gold property before?

A. No.

Q. Had you ever managed any business before?

A. On a small scale. I have been in the general merchandise business, in one of the Western towns, a small town. It was successful until the crops dried up and the price of wheat went down, which I could not regulate, and it was not successful at the last. 603

Q. Do you know whether any leases of the property of ground in the mine were made by the Receiver to persons to work?

A. I have understood so. I have no means of knowing, except what I have been told; this is the only means I have; it is the talk of the camp.

Q. You had nothing to do with the accounts by which these leases were closed up, had you?

A. I had, up to a certain date—perhaps the last of December. Since that time I did not not keep the books of the Receiver. I cannot tell when I

604 Edmund H. Wilson.

commenced to keep the Receiver's books. I think it was in October or November, 1895.

Q. Do you know, during that period that you had the Receiver's books, what proportion of the value of the gold was taken out by the lessees, and what by the Receiver himself?

A. I do not know.

Q. Can you form any idea?

A. I know that they took out a great deal.

Q. The lessees took out a great deal of gold?

A. Yes; we supposed they did; I have heard
605 this. I don't know anything personally about it.

Q. You know what the books showed?

A. Yes, sir.

Q. Did the books show that they had taken out a great deal?

A. Yes, sir; at least it was quite valuable.

Q. What did the books show in regard to the Receiver, whether he took out more or less during that time than the lessees under him?

A. I should think, probably, the Receiver took the most out.

Q. Will you swear to that?

A. No. I will not swear to anything about those books because they are not on my mind. I don't
606 know.

Q. Did he take out one-half as much as the lessees?

A. I could not say.

Q. Did he take one-fourth as much?

A. I would not swear to anything of that kind on those books; I do not know.

Q. Do you know how much the lessees paid the Receiver per ton for milling their ore?

A. By the books I know; three dollars. During my management I paid two dollars and a half to miners, I think. It is possible that we paid three dollars in some cases; we have done it sometimes, in bad ground. We had the trammers down be-

607

low; we had the blacksmith, the blacksmith's helper, the millmen, two top carmen, crushermen and timbermen. I paid a line foreman $66.67 in May; that is for the proportion of the month. That was at the rate of $100 a month. I endeavored to run the mine as cheaply as possible.

Q. There was no difficulty in obtaining miners who would contract to mine and deliver the ore in the car ready for the mill at $2.50 a ton for any amount between five tons and fifty tons?

A. It would make a good deal of difference where they were going to get that ore.

608

Q. Was there any such difficulty?

A. I don't know.

Q. Did you inquire?

A. I did.

Q. Did you find any difficulty?

A. In the particular place where I wanted them to work I couldn't get them.

Q. Where was that?

A. In the north end of the third level.

Q. What was the price that you could get a contract with them at?

A. Yes; you are right; $2.45, I think, was the contract I made on that.

609

Q. For a ton delivered in the car?

A. $2.45 a ton to run a drift. I have forgotten just how that contract read.

Q. If miners would contract to drive drifts and deliver at their own expense the ore in the car ready for hoisting at $2.45 a ton, how do you account for the fact that it cost you for their wages alone over $3.40?

A. Well, it makes a great deal of difference whether they are taking that ore at a place where you can get it done for $2.45 or $5 or $6.

Q. Was there any place in the mine that you could not have got it done for $2.50 a ton?

A. There are places in the mine; yes, sir.

610 Q. Where?

A. I cannot tell you now.

Q. Can you think of one?

A. I cannot at this moment. The only reason why I can remember that is, because it was about the last thing I did.

Q. But you cannot think of one place where you could not get this at least as cheap as $2.50?

A. Well, it is my opinion the way we left it down there you couldn't get it done; the men were getting sick of it.

611 Q. When you took charge of the mine did you go under ground every day?

A. No, sir.

Q. How often did you go underground?

A. I did not go down there more than four or five times. I had a foreman at $100 a month.

Q. Do you know whether you cut the vein filling down in your working to the foot wall wherever you worked, or not?

A. No, sir.

Q. Do you know whether you cut it up to the hanging wall?

A. No, sir.

612 Q. Do you know whether you did not leave in your stopes, where you were working, half of the ore in the stopes?

A. No, sir; I don't know.

Q. You do not know that you got the ore out of the stopes?

A. No, sir.

Q. What salary did you get while you were superintendent?

A. $1,000 a year.

Redirect by Mr. Stickney:

$450 is the entire amount of money that I have invested in any kind of mining. At the time the receivership was expected, or had taken place, or

something of that nature, some legal proceedings, we were afraid that the gold might be interfered with if it was shipped by the Company. I think the first I shipped was about the time the Receiver was appointed, and, on the strength of this mortgage they went and tried to do something; they tied up our bank account and all of our amalgam, which they had no right to do; attached it and stopped our checks. Mr. Wood said that I had better ship the bullion in my name in the future. Before that I had never made a shipment or deposit in my own name. 614

By the Court:

Q. I suppose this course was pursued in order to avoid being attached?

A. That is just what it was done for exactly.

Q. Was there much of it?

A. I should think there were two or three thousand dollars.

Q. Did that go on the books in any way?

A. Yes, sir.

By Mr. Stickney:

Q. It all appeared on your books, did it not? 615

A. Yes, sir. The books are here. A pay streak of 24 inches can be mined for less cost than one of 8 or 10 inches, and if the pay streak is continuous, can be mined at less cost than if there are large intervals barren ground.

WILLIAM H. GRIFFITH, called by defendant.

By Mr. Wetmore:

Q. I omitted to ask you the date of your father's death. Was it Octobber 3d?

A. It was somewhere about the first of October.

616 I received a telegram, I think, while I was at Riverside. I think I left Los Angeles that night; went from Riverside to Los Angeles, and left there that night, and went directly to Mercer, Pennsylvania, via. The Union Pacific; he died while I was en route. It was from the first to the third of October, along there, that he died.

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617 ELBRIDGE G. WOOD, recalled by plaintiffs.

By Mr. Stickney:

Q. Will you state briefly what communications passed between yourself and Mr. Wilson as to shipments or deposits of bullion in his name?

A. We were having litigation in regard to the foreclosure of the first mortgage, and I thought the bullion might be subjected to attachments, and I told him to deposit the bullion in his own name, and see that the bills were paid as far as he could. I wrote to him to that effect.

Q. What was the date of that?

618 A. It was possibly two or three months before the actual receivership. I cannot give you the date. I told him to do it as a matter of protection.

Q. Then did he report such shipments and deposits to you?

A. Yes, sir; he did.

ANDERSON C. MOOREHEAD, sworn and examined as a witness for the plaintiffs.

By Mr. Stickney:

I live in Riverside County, California. My business is mining. I have been engaged in active

619

mining operations since 1882. I have done the practical work of mining; I have timbered in mines; I have been foreman of mines; I have been superintendent, and I have been an assayer. Yes, I have run stamp mills too. I began working in the Good Hope Mines in July, 1894, under Colonel Egan. I worked as a miner undergound under Egan and Foster and Wilson, and I did the assaying that was done for the Receiver and worked as a miner from August down to the first week in February last. While Colonel Egan was there I saw the methods in getting out the ore from 620
the mine. It was operated as economically, I think, as the affairs would justify. I think the work of getting out all the ore that could be got out was very thorough. I think that the ore was taken out fairly clean, and about all the ore that was exposed was worked out during the time of Mr. Foster. I worked in the first, second and third levels. There are also the A and B levels above first level which are half levels. I did not work in them. I have panned ore and seen it panned, perhaps hundreds of times. The work under Wilson about the same character as under the others.

621

Q. Under Egan, who was the foreman in charge of the work underground?

A. During Mr. Egan's term Mr. Powers was the foreman of the work.

Q. Who was underground?

A. Mr. Powers.

Q. What were his qualifications as to experience and skill?

A. He was a man of great experience, and certainly knew how to carry on operations in a mine.

Q. How long did he stay in charge of the work underground?

A. He was there during the term of Mr. Egan's superintendency.

622 Anderson C. Moorehead.

Q. Then who took that same place after him?

A. Mr. Collins.

Q. How long did he stay in charge of the work underground?

A. He stayed in charge until the Receiver was appointed in May, 1895.

Q. What were his qualifications for that work, in respect to experience and skill?

A. I think they were very good indeed.

By the Court:

623

Q. What was your position there?

A. I was mining during the time of Egan.

Q. You were an ordinary miner?

A. Yes, sir.

By Mr. Stickney:

Afterwards, under the Receiver, I mined on my own account, under a lease, during about five months.

Q. From your personal observations what was the average value of the ore taken out of that mine during the entire period that you were there?

624 A. I think $6 or $7 a ton.

Q. How do you make up the tonnage in figuring that value?

A. About twenty cubic feet of broken rock to the ton.

Q. How many cars to a ton?

A. The cars hold about twelve or thirteen cubic feet, and while we were leasing they estimated 1,200 pounds to the car. The average width of vein, I think, would not exceed ten inches. There were a great many broken places in the ore streak, both laterally and perpendicularly. I think the area of the barren places would exceed the area of the ore rock. There were also rich pockets at times.

625

They did not occur very often. The richness has exceeded $40 a ton for a small amount. I believe we had fifteen tons at one time that exceeded that, and about thirty odd tons at another time. There were some of the other leases that had rock that I think exceeded $40 a ton. I think about thirty tons. There were five or six different companies of other miners that had leases. The highest value per ton that I ever knew of or learned of in that mine was $44 a ton, fifteen tons. Between the first and second levels the ore is practically all mined out with exception of pillars.

626

By the Court:

Q. Can you recall the extent to which it was mined out when Egan left?

A. When Egan left the ground was blocked out from the second level down to the third level. The third was a new level run by the present Good Hope Company, and Colonel Egan had blocked out some ground south of the main working shaft, about 200 feet in length; and this was the ground that Mr. Foster mined chiefly during his time, and some north of the shaft on the third level.

627

By the Court:

Q. What was the appearance as to the extent of the ore deposit?

A. The appearance was that the ore was practically mined out for a distance 500 feet north from the shaft, and there was some ground north of this 500 feet north that was still in about its natural condition.

By Mr. Stickney:

Q. Well, altogether, how much ore was there there, as near as you can estimate it?

628 Anderson C. Moorehead.

A. Well, it is impossible to estimate it, any more than it is possible to measure a pile of boards when you can only see one end of it.

Q. Can you give us the condition of the second level while Egan was there?

A. Yes, sir; it was practically mined out with the exception of one block of ground 200 feet long and 100 feet high, and another block of ground about 150 feet long and about 40 feet high, when Foster came. This block of ground south, from the second to the third levels, I would estimate it about 2,000
629 tons. And north of the main shaft the drift was in about 75 feet, and no ore had been stoped. I mean to say that there was a little ore there, but it was small, and I think it was never mined for 75 feet, but the drift was afterwards carried further. And there was some good ore taken out there north. For the first 200 feet after we passed the point I have already spoken of, the ore was pretty good. I should think $15. After that it became not near so good.

Cross-examination by Mr. Johnson:

Q. When you went to the Good Hope Mine had
630 you been anything but a common miner?

A. Yes.

Q. You had worked at nothing but common mining until what time?

A. Until August, 1895. I do not know how many car-loads were taken up. I have estimated the stopes; I never measured one. While Egan there I worked 200 or 300 feet of stopes in length.

Q. And in walking through the levels do you want this jury to believe that you knew how high those stopes averaged?

A. Yes, sir; because I travelled up and down through there every day.

Q. And that is all the way you know?

631

A. That is the way I estimated them. I do not know exactly how wide the vein was in that mine as it was exposed during November and December, 1895. I think I know within six inches. The vein is the fissure—the distance between the walls.

Q. You spoke of a vein running along the foot wall and a vein on the hanging wall?

A. Yes, sir.

Q. Referring to a vein in that sense, how wide was the average width of the vein during November and December, 1895?

A. From four to six feet. 632

I have taken, probably, something over one hundred measurements. They were on different levels and at different places.

By Mr. Johnson:

Q. Have you that book with you containing your original figures?

A. No, sir; it may be at home. I don't know how much the rich pockets paid before the Receiver went into possession. I do not intend this jury to understand that I testified as to the worth of the ore before that time. I was speaking of the term of the receivership. I am speaking of the value that I 633 know of. I took a lease of this ground north of the main shaft and above the first level under the Receiver—I and my partner. We worked about 300 feet north of the main shaft. We had a lease of about 400 feet of ground on that level, and we worked a little all along it, above where the stopes were at that time. The hanging wall was exposed above the place where the waste lay, and up to the roof of the stopes, in almost every instance. The foot wall was not exposed all the time.

Q. Do you know whether the hanging wall was exposed all through the mine at the end of Egan and Foster and Wilson's management, in the stopes?

634 A. I think it was, with the exception of some few places where the hanging wall veins became so very small, and there they followed the foot wall.

Q. Was the foot wall exposed throughout the entire mine, in the stopes, at the end of the management of these three superintendents?

A. I think nearly all.

Q. Should you think it was exposed for half of the space in the mine?

A. Well, there were some places that had been filled in. Sometimes the waste was thrown in
635 against the foot wall. They would go up on the hanging wall vein and leave the foot wall vein for a while, and throw the waste in there, such as we did when we were leasing.

I have spoken of the average value of the ore in this mine. I have obtained it by assays, by comparing and by milling. I am not able to say how many assays I have made. I gave the returns to Mr. Boicourt; whether he kept a record or not I don't know.

Q. Did you ever go through the mine and sample it in a systematic way and make assays of it?

A. No, sir; I have gone through the parts that
636 were working during the time that the Receiver had charge of the property. I took samples and made assays. The result was, according to my recollection, in the neighborhood of $7. I have taken, possibly, anywhere from fifty to a hundred, and I have taken a great many samples out of the bin. I took as near a sample as I could out of the bin that the ore was running through from that particular spot.

Q. But you haven't anything but an impression as to how you arrived at that determination, have you?

A. Well, I have a belief, too. I assayed with a crucible. The scorifier is considered to give a very little bit higher than the crucible.

Q. How many miners did Egan employ underground on an average?

A. I should think between 30 and 40. The two shifts—15 to 20 on a shift. It might have exceeded it five or six—trammers and timber men and foreman. I don't think it would reach 50; perhaps 30 to 45.

It was a 20-stamp mill. The vein was small, and there was great deal of material to take out that was not ore, which would not keep the mill running. I think it was probably a reasonable amount of men. I think they broke rock enough, considering the space and the smallness of the vein. 638

Q. Was there room enough for them to work properly, with reasonable economy, and work the miners underground within close contact to each other?

A. At certain times they may be right near to one another. They may be taking stopes, and one go one way and one another. At one time they are close together. There was no marked difference between Mr. Egan's management and Mr. Foster's in regard to that. Mr. Foster did not go down often—I think more than once a week. Mr. Wilson did not go underground often.

639 Q. Now, as to the thoroughness of mining. During Egan's management do you testify that this mine was mined thoroughly—that the ore was extracted thoroughly?

A. Do you mean to say that there was no ore left at all?

Q. You are testifying as an expert. I ask for an answer to the question.

A. I think you are the first one that has told me so.

The Court: We think you are a pretty fair expert.

The Witness: I have not been put on here as an expert.

640 Anderson C. Moorehead.

The Court: Give us the reasons for the conclusion you formed.

The Witness: Well, ask that question again, please.

Q. (Repeated.) During Egan's management do you testify that this mine was mined thoroughly—that the ore was extracted thoroughly?

A. There was some ore left.

Q. Do you testify that it was mined clean, stoped clean, from the foot to the hanging wall, as he went up the stopes?

641 A. No.

Q. And it was not stoped clean from the foot to the hanging wall over half of the stopes that he mined, was it?

A. As one space became very small he would leave that and take a larger one sometimes, and then probably go back to the other afterwards.

Q. This fissure that we have spoken of—the distance between the foot and the hanging wall varied in width, didn't it?

A. A great deal.

Q. And the levels that ran through this mine were driven nearer which wall?

A. They were usually driven near the hanging.

642 Q. So that the hanging wall was part of the side and roof of the level?

A. Yes.

Q. How wide were these levels?

A. Four feet, and as wide as seven feet at times when the rock would break in that manner.

The first level north is from four to seven feet wide.

The levels nearly always went through from hanging to foot wall, with some exceptions. I can think of some exceptions. The lower level, and the third level north, the foot and banging were from 15 to 20 feet apart; that was about 250 feet north

643

of the shaft, and covered about 50 or 60 feet—perhaps 80 feet. I don't believe that they had the foot wall in the second level north. I don't recollect for how long a distance they are not on the foot wall. That level is not broken through to the foot wall during its entire length now; it is for half of it—I think for two-thirds.

Q. So that it was erroneous if you testified that the levels to most of the mine occupied the whole space between the foot and the hanging wall?

A. No; I think I did not say that. I said I thought most of the time they had been, and I still 644
think so.

Q. Go through from the hanging to the foot wall?

A. Yes.

Q. But where they were wide they did not go through to the foot wall?

A. No; there was occasionally a cross-cut.

In this mine the vein will split and follow, a portion of it just under the hanging wall, or near it, and a portion of it just above the foot wall, or near it; and this material that is between the two veins in that case is waste; it is usually called a "horse" when it is hard. I think the foot-wall vein is the richer. If 645
the level were driven under the hanging wall it would cut the hanging-wall vein where it was split; and where the fissure widened out and the level was over four to seven feet wide, it would not cut in that side of the rich or foot wall vein. The extent of the level, and the ore that showed, is not a fair indication of how much ore there is, or where the vein is, in the interstices between the foot wall and the hanging wall which is opened up by the stopes above. There may be ore anywhere. If the level ran through dead ground, or through a place where there is a slight vein on the hanging wall, we often found in that mine rich veins of ore by

cross cutting, where the level was run under the hanging wall.

Q. If the level was just under the hanging wall, and the width of the fissure was wide there, so that the other side of the level was not in the foot wall, then by opening up in the stope, or drift above the level, over towards the foot wall, you have frequently discovered the true, rich vein?

A. No, sir; I never knew it to be so in that mine. I think it usually gives some indication. If there is a vein going into the foot, then there is a chance
647 of its being a bunch of ore, or perhaps a body of ore; but if there is not, I have never known one found without a stringer, as we call it, of rich ore leading to it. They had carried the two veins up to the point where we got the greater part of the rock, under the lease, and the veins were diverging very rapidly in going upwards, and they had quit operations, probably because it was costing them so much. We followed the foot wall vein, and it was below level hanging wall stope, although in line with foot wall.

Q. But was it new ground that you went into there?

A. It was ground, of course, that has never been
648 stoped. You can only stope it once. That was about fifty feet on the average above the first level. The vein, thirty to thirty-five feet above the first level, commenced to diverge, to split. The waste material between the foot wall and the hanging wall increased in size. We took ore from both veins. We timbered it sufficiently to work. There were three of us. Myself and partner hired the others,—one man, and part of the time two men. We paid them three dollars a day. That was half a dollar more than had been paid by other parties. We agreed to pay for hoisting the waste, but didn't have any to hoist, because we filled in the waste. We paid three dollars a ton for milling the ore, to

the Receiver. The lease was for six months, we quit at the end of five. We made something over twelve hundred dollars apiece profit. That included our time.

Q. And this was ground that had been abandoned by the Company, wasn't it?

A. Yes, sir.

Q. That had been worked for some time before?

A. Well, not for several months.

Q. And it was more expensive to mine there than it was below?

A. Yes, sir. 650

Q. A good deal more expensive on account of this change?

A. Yes, sir.

By a Juror:

Q. In how many months was it that you made twelve hundred dollars apiece?

A. Five months.

Q. Why didn't you work for six months?

A. Because the ore played out; there was no more ore there. We were going towards the surface all the time from the place where the Company had abandoned it. 651

By Mr. Johnson:

Q. What was the average value by the ton for each run?

A. I think about thirty-four dollars—thirty-three or thirty-four. The total number of tons was one hundred and ten. Total net cash received from the Receiver, I think, was something over $3,700.

Redirect examination by Mr. Stickney:

Q. What period did your estimate of seven dollars a ton cover?

A. The receivership.

652 Anderson C. Moorehead.

Q. Take the period before the receivership—what was the average value of the ore?

A. I have no way of estimating that.

By the Court:

Q. You seem to have struck it rather rich. Of course you had some inkling of the character of the ore body on that level when you took your lease?

A. Yes, sir.

653 *By Mr. Stickney:*

Q. How did you get it—how did you happen to strike it rich?

A. We took the indications and followed them up, I suppose, and happened to get it. It lay in a little pocket over in the foot wall, right in against the foot wall. I suppose we happened to be lucky the day we started. The ore that we took out lay in against the foot wall—the most of it. We took ore for almost the whole distance of our lease. We tried a great many places before we found a place that suited us. We went into some very dangerous ground to get it, too. We went into old stopes,
654 and up old shoots, and we took a great deal of risk to find it.

Q. And then you found a rich pocket?

A. Well, we found one rich pocket, at any rate.

Q. Not more than one?

A. No. The others were not large enough to be called pockets—just a handful or two here and there.

About ninety per cent. of the value of the ore mined during our lease came out of a space about 20 feet or 25 feet in height, and about 30 feet in length. I have spoken of the foot walls being covered by waste. It was necessary in the working of the mine. When they left the foot-wall vein

655

for the hanging wall, it was at times best to throw this waste in against the foot. It saved hoisting, and was the proper way to work the mine; that was the reason that the pay streak against the foot wall was not mined. We took out some low-grade ore under the lease along with the good—possibly thirty tons—and it averaged ten dollars. We couldn't afford to take out ore at six dollars or seven dollars; we couldn't do that at a profit. It cost us all the way from $6 to $20 a ton, working as economically as we could, delivering at our level in shaft, Company took it there. I think $19 was 656
the highest. In estimating the $2,400 our time is included. That was after paying for our supplies and our labor that we hired, and the material that we used in work. Wherever a vein splits it makes it more expensive. I should think that in at least one-half of the mine the ore was in two streaks.

Q. Are you able to state to the jury any estimate that you consider reasonable and accurate as to how much that increased the cost of mining?

A. It would increase it very largely, particularly when the walls were five or six feet apart. In fact, when they became further apart than that it was impossible to mine it as one vein; we had to mine 657
it as two separate streaks and carry it up separately. There was too much waste material to handle in the vein to secure any profit from the mining of it.

Recross examination by Mr. Johnson:

This $3,700 that we received from the Receiver was the total. The Receiver's $3 a ton for milling comes out of that. Our profit, including our time, was $2,400. 110 tons at $3 a ton was $330. That would leave $3,370 net. Taking out the $330, would leave about $3,400; and taking out our $2,400 leaves $1,000 for the expenses; the royalty of twenty per cent. was in addition.

658 Q. Then your twenty per cent. came out of that $3,700?

A. The Receiver's twenty per cent. royalty came out of that.

Q. Twenty per cent. of $3,700 is $740, and, subtracting that from the $900, brings it down to about $200, your expenses, including your labor?

A. Oh, I think not; I think you are mistaken there. I know we didn't get it out on $200. We paid out more for labor than that, to say nothing of our time.

659 Q. You are quite clear that you got $3,700?

A. Yes, sir; I am quite clear about that.

Q. And that you and your partner cleaned up $2,400?

A. Yes, sir.

Q. And you are quite clear that you employed one man all the time and another man part of the time?

A. Yes, sir.

Q. You are quite clear that the Receiver's twenty per cent. came out of the $3,700?

A. Yes, sir.

Q. And you are quite clear that your expenses for milling came out of the $3,700?

660 A. Yes, sir.

By Mr. Stickney:

Q. Then how do you figure up the cost of ore value?

A. I felt that our time was worth something. I didn't consider that I should give it gratuitously.

Q. What did you figure?

A. I was figuring on the men at $3 a day.

Q. I mean the entire working expenses, per ton, of what you got out under your lease?

A. I have not made any figures on that.

Q. Can you state it approximately, without taking the time to figure it?

A. No, sir.

Isaac N. Boicourt. 661

By Mr. Johnson:

Q. Are your figures in this matter as accurate as the other figures that you have given?

A. I beg your pardon, I have not given any figures on this question.

Q. I understood you to say $6 to $20?

A. Oh, I thought you were talking about this. My figures were from $6 to $19; I said $19, instead of $20, afterwards.

Q. And that estimate, I say, is as accurate as the other estimates you have made?

A. That included our own time and the expenses. 662

Q. That is as accurate as your other estimates?

A. Yes, sir.

ISAAC N. BOICOURT, sworn and examined as a witness for the plaintiff.

By Mr. Stickney:

I live at San Leandro, a suburb of San Francisco, California. I have been engaged in the management of the Good Hope Mine for a year. My regular business is not that of a miner. I have only 663 been engaged in it, at times, for something like fifteen years, not as a miner, but as an operator in, and promoter of, at times. I never dug any ore myself; never with my own hands. I have not been mining in the precious metals for quite a number of years—since 1884—until I went into this the 20th of last May. From 1881 until 1883 I was actively engaged in developing mines and superintending the development. For a number of years I was also engaged in coal, oil and gas mining. From May, 1895, I have had some connection with the Good Hope Mine. I was superintendent and manager of it under the Receiver—down to the

present time, you might say. I made an examination of the mine very soon after I went there. It did not become very thorough for three or four weeks. It took me a good while to make it. I cannot say that I completed it until the time I left, because I continued examinations all the while; but during the first week I examined it sufficiently to give me an idea of its character and condition. I have been in the mine a great deal of the time. I explored all parts that are accessible, I think. I operated principally by employing men on wages.
665 Some of the old workings, where the ground had become dangerous and inaccessible and expensive to work, I let the men work on shares, percentage. I took out about 6,000 tons, I believe. I have here, I think, the exact data. I took out through my own employes 4,973 tons. That produced in gold $21,146.56, averaging $4.25 a ton. In that 4,973 tons there was some 75 or 80 tons on the surface. It was adobe dirt that carried gold. In addition to the 4,973 tons I milled 654 tons of ore in the dump by the mill. It produced in gold $1,609. That averaged $2.45 a ton—a little more. I carried on those operations as economically as I knew how to do. There
666 were from 10 to 14 lessees; I don't remember just exactly. I remember Mr. Moorehead as one of them. There were three who were known as Shelley, Crawford and Sauter. Those three men worked together as partners. There were Moorehead and Nolan; Smith, Langford and Bates were partners; Murray and Happe; Keogh and Jones. Those were all that did anything to amount to anything, all that produced any ore and milled it. They got out altogether 870.5 tons of ore. It was milled in the Good Hope mine mill under my personal observation. The whole of it produced in gold $16,271.46, averaging $18.69 to the ton.

Q. Were there other men, lessees, if you call

them so, who also worked there in the mine the same period, under your observation?

A. These were the only ones that produced any ore.

Q. Were there others that did not get any?

A. There were others who prospected around and tried to find somewhat that they thought would pay, that did not.

Q. Did not succeed?

A. Yes.

Q. So this product that you have given of those lessees is only of the successful ones? 668

A. Yes, sir, I want to make an explanation here.

Q. What is it?

A. The record book of the number of cars of ore that were hoisted. I am not so sure that all this 870 tons is separate from the 4,973 tons. That is, I am not sure that a part of this 870 is not included also in the 4,973 that I produced. The cost per ton of mining and milling it was about $6.97. The average value per ton of the entire output there, $6,006. The weight per car load was 1,200 pounds. I measured the cars to ascertain their capacity, cubic feet, and then measured and weighed different samples of the ore. Relatively, mining there is expensive. The scarcity of the ore made it so 669 more than anything else. A great many places there is no ore in the veins at all to amount to anything, probably a little talc seam, in some places an inch or two. There are blocks of it where there is practically no ore at all. The average width of pay streak where enough to mine—where I found ore that I could mine—we usually mined in from 12 to 20 inches of ore, taking the whole mine. I don't think the pay streak of the entire vein would average over 10 inches. In the levels that I run and those that had not been worked when I went there, I think that fully two-thirds of it would not pay to work on account of the thinness of the pay streaks,

670 that is. the thinness as to the ore of that quality. Of course you can work a pay streak an inch thick if it is rich enough. I sampled a great deal with what we call the panning method. I never assayed any. For free gold panning is perfectly reliable to one who understands it. There is gold that is not free in what we call the sulphurets—the iron sulphurets. This panning process determines very accurately the amount of free gold that there is in the rock. One could not determine exactly the amount per ton of the gold that the rock contained
671 by panning, but one who is accustomed to working a mine and panning rock would know sufficiently well for all purposes how much the ore would mill as he tested it in that way, whether it would pay to mill or not—that is, as to whether the ore would pay to mill or not pay to mill; it is a sufficient test. I think the highest mill run for 25 tons was something near $45; probably 30 or 40 tons came out as high as that.

Q. Will you state what facts there were to make the difference between the results got by your men whom you employed regularly on wages, and the results got by these men whom we have been calling lessees?

672 A. I was simply working the mine throughout, and they were working the small rich streaks and pockets.

Q. You were taking the ore right straight along as it came?

A. I was taking the ore right through as it came in the new levels that I was running, and some out of the old levels that were there.

Q. How thoroughly had the work been done by the men who had been working there before you?

A. I think it had been done quite thoroughly. I saw nothing to the contrary.

Isaac N. Boicourt. 673

Cross examination by Mr. Johnson:

Q. Is this Dr. Boicourt?

A. Sometimes called so; yes.

Q. Have you been a practicing physician sometime?

A. No.

Q. You are called "doctor"?

A. That is a title that some people give me; yes.

Q. And you never have practiced?

A. No, sir.

Q. You are sure about that? 674

A. Yes, sir.

Q. You have testified to certain experience in mining in 1882 and 1883. What kind of a mine was that?

A. I was engaged in different kinds of mining.

Q. Will you name one?

A. One was a galena silver mine.

Q. Another?

A. Another was a galena silver mine.

Q. Another?

A. Another was a copper mine.

Q. Another?

A. Another was a copper mine.

Q. What gold mines? 675

A. No gold mines.

Q. A galena silver mine is a smelting ore, is it not?

A. Yes, sir.

Q. And this is not a smelting ore in this mine?

A. No, sir.

Q. Do you know whether there is any difference in mining a smelting ore and a free milling ore or not?

A. I think there is a little sometimes; sometimes there is not. The galena ore is a metallic ore that you can tell in the dark. There isn't any special difference in the mechanical part of it. I never

676 Isaac N. Boicourt.

mined any free milling gold before I went there as an employee for the receiver, but I had been in such mines five or six times. All my experience in the mining of free milling ore has been obtained in this twelve months. I was a clergyman for about seven years, from 1873 to 1881. Gave it up on account of ill health.

Q. You have been an operator in the oil regions, too, have you not?

A. Yes, sir.

Q. And in coal mining?

677 A. Yes, sir.

Q. Your business has been very varied?

A. Quite a good deal. I am a partner of Wilson's, who testified here, in certain ventures. We located some claims together last June or July, after I went into employment of Receiver. Wilson was my bookkeeper after the last of September. I had kept the books before that. I had not made any journal entries, and had not entered up my vouchers or pay roll at all. I had not kept the books in the form of bound journals and cash books.

Q. You kept them on slips of paper up to that time?

678 A. In mining every expenditure and every purchase has its slip. Those slips were simply filed away.

Q. But you had no books?

A. I had not transferred them. I considered them my books of original entry. I had Mr. Wilson write up the books. I expected to make a report on the first of January, and I wanted my books made up. I did not report on the first of January.

Q. Was not the occasion of writing those books up to comply with an order of court that you produce the books?

A. No, sir.

Q. There never was any order of Court, was there, that you produce some of the books to show how the Receiver had managed the trust?

A. How do you mean produced them?

Q. Was there any order of Court that you should produce some books in Court and show them to the expert who was sent out there?

A. There was an order that I let Mr. Smith, who sits there, examine my books. I did not give them to him that moment, because my books were not entered up fully.

Q. And after that you had them written up, 680
didn't you?

A. I had them made up. They were absolutely correct.

Q. Did you have a ledger when you first talked with Mr. Smith about it?

A. I had not made any ledger at all.

Q. Did you have a ledger ten days after that?

A. I did. It was prepared in the meantime by Mr. Wilson. All the data that I have with me is that (indicating a paper), and that I happened to have accidentally. I came on from California to give my testimony, and that is all I brought. I mined and milled for the Receiver something over 681
2,000 tons, between 2,000 and 3,000 tons, before December 30. I had been operating the mine since the 7th of June, nearly seven months, to the 30th of December. I operated three months after. I mined nearly as much after December 30 as before. I think I had an average of 12 or 15 miners—men working around prior to December 30; most of them were not mining ore, but running levels. After that I had a few more men, and nearly all of them working ore. I run the A level 80 feet from the surface. I extended the third level, the bottom level, 150 feet, I think. That is all I did in the way of running levels. I did not do anything to amount to anything out of the old first level. I

took some from the B level, and a considerable quantity from the second level, five or six hundred feet from the shaft north. I worked all of the A level. It extends something like 400 feet north and 125 to 130 feet south. I simply stoped some ore in the B level, and made a cross cut. On the north of the shaft, and near the shaft, I think the stope was something like 40 or 50 feet wide. I carried it up 15 or 20 feet. I under-stoped a little on the first level, and started to make a raise there; something like 800 feet, but continued it only four or five feet.

683 I did considerable on the second level, 500 feet north; something over 100 feet. I began on the third level about 140 or 150 feet north of the shaft.

Q. And followed along the level how far?

A. Clear back to the face of the drift. I never took those measurements, and my memory is not very clear.

Q. To the best of your remembrance?

A. Near 200 feet; I don't know but more.

Q. How high did you run that stope?

A. Some of them I carried clear through to the second level.

Q. And others?

684 A. Others just as far as the ore was good, some 30 or 40 feet.

Sometimes I was down two or three times a day and sometimes once a day; sometimes I did not go down for one or two days. Usually I aimed to go twice a day. I made very few measurements with a rule or tape line. My eye was sufficient always to tell whether there was ore enough to work.

Q. Were the workings that you saw broken through all the way to the foot wall?

A. No.

Q. Were they broken through to the hanging wall, usually?

A. In some places; not to the hanging wall.

Q. How much of the workings that were exposed

at the time you went there were broken through to the foot wall; how large a proportion of the workings when you went there that were exposed, showed the foot wall?

A. It has always been a question with me where the foot wall of that mine was. There is a great difference of opinion where it is. What is usually called the foot wall, what had been worked as a foot wall, was exposed in most of the workings. I don't know where the foot wall is in all places.

Q. In this mine, where it did show what you suppose was the foot wall, there was frequently a 686
vein along there, wasn't there?

A. Yes.

Q. And sometimes, when you or the lessees cut through the ground that was not worked on the foot wall, they found ore there, didn't they?

A. Yes; I did myself.

Q. Although the vein on the hanging wall has been worked out before?

A. Yes, sir.

Q. So that, when you have testified to what your eye showed you to be the width of the vein, you were referring usually to the hanging wall vein, were you not?

A. Sometimes to the foot-wall vein; sometimes 687
the hanging-wall vein left off 20 feet and the foot wall vein followed.

Q. And sometimes beyond that the hanging-wall vein?

A. I think so. I have no way of computing how many measurements I made with my eye.

Q. Did you set it down on paper?

A. No, sir.

Q. How did you arrive at your average?

A. It is just my opinion.

Q. Is it anything more than just a guess?

A. It is just a guess; that is all. I thing it is a pretty good one, though.

The Court: Is it your theory of the case that the product of this mine was so limited because it was not properly worked?

Mr. Johnson: Yes; that is one of our reasons for accounting for it. We show that each one of the leasers where they broke through found ore. They have attempted to show the value of the mine by the working of these inexperienced persons one after another.

The Court: Here is a company in possession of this mine, by itself and its Receiver, for a long period of time, and they had a good many men there who understood mining.

Mr. Wetmore: They proposed to show what was material, that the ore in that mine, as it was taken out by the Receiver, ran very low. Now, we propose to show that those are not the right figures. The lessees who were working on their own account in various parts of the same mine, and at the same time, ran very high. We shall ask the jury, when we get to our side of the case, to find that the statements of the product of this mine have been very greatly exaggerated; and this evidence we are introducing as a part of the tendency to support that contention on our part, and which we have other evidence to corroborate.

Mr. Stickney: Practically, as to one point, there will not be any controversy at all. We have conceded from the beginning that there were rich pockets of ore there, and then we have stated that some of those mill runs went up to a very high rate.

Mr. Johnson: I will make it very short.

Q. Where did Smith, Langford and Bates lease; where was that?

691

A. The south side of the shaft in the old working.

Q. Between which levels?

A. Anywhere they wanted to go.

Q. Where did they work?

A. They worked between the second and the surface.

Murray and Happe lease was north of shaft, between 2d and 3d levels. They worked two weeks, I should think, above the second level, without getting ore that they could get much of anything from; and then, after two weeks' work, they 692
struck into a pocket of rich ore, maybe 75 or 100 tons of it. It would occupy, I think, something like 15 or 20 feet in length, and probably the same in width. Just about a square of 15 or 20 feet; this is a guess. Keogh and Jones worked north main shaft, way back between first and second. Most of these lessees went in the ground that the Company supposed and I supposed was exhausted. The Company had taken out what they thought was the ore where these people worked, all on the south side of the shaft. The waste fills the stopes of the old workings, and the question as to whether or not it was mined out at that point cannot be 693
determined now. And if ore is left there it is gone forever, for good, easy workings. They did not mine under the waste in the stope. They, the lessees, mined simply where there had been no mining done. I hoisted as much waste as I did ore. The waste I hoisted—most of it—in development work. There was no stope where I took it from. I took it from the tunnel. Above the first level the fissure widened as you went up. The true foot and the true hanger walls went away separate a good many feet. That was the reason that made it especially expensive above there on the north side of the old first. Up a ways in the stopes above the first level the foot and hanging walls parted and

went away off; and it was up in that space that it was so very expensive to mine. You had to follow the foot or the hanger; you could not follow both. It was there that Moorehead had his lease. The ore was better coming out of the A level than above. I knew from the character of it, from the tests. I was working A level same time I was working lower level.

By the Court:

695 Q. How much do you think it would average?

A. I think likely it would have gone, taking an average through, about $5.

Q. The A level?

A. The A level.

By Mr. Johnson:

Q. You have testified that you could tell whether or not it would pay to mine ore by panning it; is that so?

A. Usually; yes.

Q. Could you tell?

A. Yes, sir.

696 Q. What experience had you in panning before you went to this mine?

A. I had done a good deal at different places. In panning the ore particles drop to the bottom, the gold goes to the bottom.

Q. If the ore runs $20 to the ton, all the gold there is in that ton is the size of a $20 gold piece, is it not?

A. I should think so, an ounce. We usually pan about a pound. We would get out of that 1/2000 of an ounce of gold.

Q. How big a piece is that?

A. It is not very large, but it is generally very plain in the gold pan. It looks big to a miner. I

did not weigh it to tell—I could tell by the—by the looks of it.

Q. That is the way you told, is it?

A. Yes, sir.

Q. Is that the way you determined what to mine and what not to mine while the mine was under your control?

A. Not altogether. I had a good many assays made.

Q. Do you know whether you drove a level right out into the country rock or not while you were working the mine? 698

A. I went off on a spur, on what is called a clay seam, for about 100 feet. I did not find any gold there; Mr. Sigafus went, I understand, 225 feet in that same seam and did not find any; that 100 feet is a portion of the A level I have testified to. I also made a cross-cut into what might be called the country; that was the B level, 30 feet. The ore that I extracted after the 30th of December was richer considerably than the ore that I had extracted between the first of September and that time; it was richer. My best ore was up to the first of September. My ore during July and August was probably $10 or $12 ore. The average would not be much different, counting from 699 the good run I had in July and August. That is my opinion now, without data. I never figured it out. The poorest ore I did run was during October, November and December, all very low grade. That was the time when Messrs. Smith and Goldsworthy were there making their examination. They got an order of court to make a mill run there while I was in possession of the mine. I sent up ore for them to make that mill run; from the third level mostly, a little of it from A level. It came from the regular stope, back something like 200 or 250 feet from the shaft; from the regular mining there. That ore ran $2 or $3 a ton. I think I had probably 1,000 tons after that right in

the same level, going north, as poor. The car that was used almost altogether contained about 13 cubic feet.

Q. Where was that?

A. B level, second level, third level, and part of the time on the A level.

Q. That was the car that you measured?

A. Yes.

A cubic foot of that ore weighed 105 to 108 pounds. The car would hold then, 1,300 to 1,400 pounds. I counted 1,200 pounds to car, because one
701 car was small and I averaged it.

Q. You testified that two-thirds of your levels would not pay to mine?

A. Yes.

Q. How did you arrive at that conclusion?

A. I arrived at it because there was no ore there.

Q. No ore there?

A. Not sufficient to pay to work?

Q. Which is it—no ore, or not sufficient to pay for working?

A. Where there is only a talc seam, an inch or two exposed, in and out, once in a while, we call it
702 practically no ore.

Q. How much of your level did not have any seam of quartz in it?

A. I think in the A level there was 200 or 300 feet that would not have enough to call ore at all; just a seam, an inch or two probably, here and there.

Q. How much more than that in this level did not have sufficient seam to count?

A. Down in the bottom of the level a great deal of the time there was two or three or four or five or six inches of mixed stuff.

Q. Where was that?

A. The third level.

Q. How far from the shaft?

703

A. Back something like 200 or 250 feet—from there on back.

Q. You say the place where you thought it was big enough to mine was from 12 to 20 inches?

A. Yes, sir.

Q. And that was one-third of what you worked?

A. About one-third of what I worked there.

Q. Now, you say that two-thirds of what you worked had not enough to count?

A. No.

Q. And still you say the average of all you worked was ten inches?

704

A. I don't say the average of all I worked was ten inches.

I sorted the ore below ground, except in the crushing, throwing out large chunks of granite that would come up.

Q. How much granite did you run through the crusher?

A. A good deal; sometimes the ore would be one-third granite; sometimes one-half of it, a little while. There was not any that run through the crusher two thirds.

Q. That that you run up on Smith and Goldsworthy when they were making their mill run, how much of that was granite?

705

A. I don't think that was over twenty-five per cent. of granite, right through. Sometimes a car might come that was two thirds granite; and two or three cars would follow that would not be any granite. I am talking of the average that went into the ore bin. Whatever granite came up, except the little pieces that were thrown out, went through the crusher. I milled it because it could not be separated. The granite is frequently mixed with quartz. The ore I ran through the crusher sometimes half granite, sometimes a good deal less than half. I think very seldom a car, even a single car, would be more than that. I have got granite

706 that I found would go $5 or $6 a ton. Soft decomposed granite comes in ore, and in shooting ore out you have to shoot out granite. Impossible to separate it. The lessees worked over a great deal larger territory than I did. Keough and Jones did not make any money. Some mill runs of other lessees made at a loss, others at a profit. The skip held about 16 cubic feet, I believe. The 600 tons I milled from the old dump more than paid for milling; just about paid expenses. I had no foreman in the mine; I attended that myself. I measured
707 with my eye as to the thickness of the vein, and I think I can tell within half an inch anywhere.

Redirect-examination by Mr. Stickney:

When the books were written up by Willson I had vouchers and original papers for everything. I checked the books off myself. They were accurately done.

Q. The mill run that you have been asked about for Smith & Goldsworthy—how was the ore selected that you sent up for that?

A. A considerable part of it was already in the bin. I had charge of the mill before I knew they
708 were going to make a run.

Recross-examination by Mr. Johnson:

The Receiver was not in charge of the mine, except through me. I don't remember how many times he came down—three or four.

DUDLEY PORTER, recalled by plaintiffs.

By Mr. Stickney:

Q. As to the date of the payments of the money in to you by the original subscribers: You have

testified that some of the actual cash payments were made after the purchase was completed in California. For those payments had you notes in your possession?

A. Yes, sir. The notes were discounted at the bank, and the money was credited to the certified check account. I, perhaps, neglected to state it the other day.

Q. Against which you drew your two checks?

A. Yes, sir.

By Mr. Johnson: 710

Q. How many of these notes were discounted by you at that time?

A. The $90,000. I don't remember all of them. There was Mr. Wood's note, Mr. Hobson's, my own, Mr. Kennedy's; that is all I remember. Mr. Wood's was for $15,000; Mr. Hobson's the same. Mr. Kennedy's, I don't remember the amount. I don't remember the other notes; there were notes for the whole amount.

Q. What other notes were there?

A. I don't remember the other notes. There were notes for all of them; there were notes for 711 the whole amount.

Q. But you have not accounted but for $35,000?

A. Yes; I said my own, $15,000; Mr. Hobson's $15,000; Mr. Wood's $15,000.

Q. Was that in addition to his subscription?

A. Yes, sir. He accounted for $30,000, and I accounted for $30,000, which money was paid back to me as I have testified.

Q. That is $50,000 in all; where is the other $40,000, making up the $90,000; where did that come from?

A. I say there were notes that were discounted; I cannot give you the notes. Mr. Kennedy's was one; I think Mr. Morse's was one, $15,000, I think.

712 Dudley Porter.

Q. Did Mr. Morse put in $15,000 in addition to his subscription?

A. I don't remember about that.

Q. Did not Mr. Morse's $15,000 go to account of the other check—the $60,000 check?

A. I think not. I had notes for their subscriptions.

Q. Can you name anybody else who had a note?

A. No, sir.

Mr. Stickney: The payments on permanent improvements out of the income of the
713 mine, which ought possibly to be deducted from the figures that we have before given for operating expenses for the entire period.

The Court: What period does that cover?

Mr. Stickney: The entire period until the receivership.

Plaintiffs' counsel offers statement of permanent improvement expense account in evidence, and the same is marked Plaintiffs' Exhibit 25.

Mr. Stickney: We produce cash-book and deposit bank-book for inspection of counsel
714 for defendant.

We also produce a schedule giving the dates and amount of all the receipts of bullion, beginning January 24th, 1894, and ending May 31st, 1895. They are taken from the books that are already produced, so that the summary can be read in evidence; $98,757.40. That is the entire bullion receipts during the period from January 24th, 1894, to May 31st, 1895, inclusive, with $35 from other sources added to it afterwards.

Plaintiffs' counsel offers in evidence the schedule referred to, and the same is marked Plaintiffs' Exhibit 26.

715

ALBERT L. JEPSON, recalled by the plaintiffs.

By Mr. Stickney:

The methods of getting out the gold from the ore that was crushed there in the mill after Mr. Sigafus sold the mine was the same, only the crushing part of it. The one had rollers that crushed it; the others were stamped—raised and dropped on it. The plates were different. They were straight. The others had a drop from one to the other; the process was the same.

716

By Mr. Johnson:

The mill company put up was a stamp mill.

These stamps dropped into a shoe, an enclosed place with a bottom to it, in the front of it there were chuck blocks, faced on the inside with copper plate, covered with quicksilver to catch the gold particles. Those chuck blocks at the time Messrs. Smith and Goldsworthy made their examination were smooth all the way around. There were no dents in them; they were not broken in any way. The copper plate on top was smooth all the way round. You cannot get on only so much quicksilver. It is the same as putting water on to something, to just wet it.

717

Q. How much did you use?

A. I used owing to what the ore was like.

Q. How much did it make?

A. Sometimes I didn't use any for three hours; sometimes I used an ounce an hour; and sometimes two ounces an hour.

Q. How did you arrive at your weight of an ounce an hour?

A. I guessed at it.

Q. You put it on with a spoon?

A. Yes, sir. The spoon held about five ounces.

718 Eben E. Olcott.

Q. At the time of this Egan mill run how much quicksilver did you use during the whole run?

A. I did not weigh it.

Q. How many bowls full did you use?

A. I didn't fill the bowl full.

Q. You didn't use a whole bowl full?

A. Very nearly, if it had been full.

Q. How big was that bowl?

A. I should think it would hold nearly a quart, maybe it didn't hold so much, for it was one of those bowls that are flared up, small at the bottom;

719 I don't know how much it would hold.

EBEN E. OLCOTT, sworn and examined as a witness for the plaintiffs.

By Mr. Stickney:

I have resided in this city all my life. I am 42 years of age, a mining engineer; have been since my graduation in 1874, 26 years. I studied at the School of Mines, Columbia College, New York City, four years. I have been constantly engaged

720 in mining operations since. My first position was in 1874, since which time I have been constantly in charge of mining operations. I have made examinations of gold and silver mines—a great many. I have been the expert in a great many large cases. Examining for purchasers, and since 1884 almost exclusively. I am familiar with the selling price of gold mines in California, and in other States.

Q. Assuming that the Good Hope Mine was opened up by two levels, each having a length of 950 feet, level No. 1 being 250 feet below the surface, and level No. 2 being 100 feet below No. 1, and on the same vein, each level being in the vein its entire length, and each level being connected

with a main shaft which had a depth of 416 feet, and was in the vein at the bottom; and assuming that the ore body in the mine was a continuous one the entire length of said levels, with an average width of 24 inches, and with an average value of at least $18 a ton free milling gold, and that there was of said ore 44,733 tons in reserve, above the second level, and 37,333 tons in sight below the second level, and that the entire cost of mining and milling said ore, including all charges of whatsoever nature, would not exceed $7 a ton, that in a twelve months' mill run 2,434 tons of ore had been 722
mined and milled as mined from said mine, and had produced in bullion $57,879.78, being an average of $23.78 in free gold per ton, at a cost of $15,500; and assuming further that the Good Hope mining claim were 4,000 feet in continuous length, and in other respects were not developed, and that the main shaft was in ore at its lowest depth, that the levels were in ore at their ends and throughout their length, and that there was nothing seen, visible, that afforded any reason for believing that the ore body did not continue in length and depth for an indefinite distance, what, in your opinion, was the fair market value on the 1st of January, 1894, of such a mine? 723

Objected to by defendant's counsel as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert upon many matters which are not included in any statements of false representations against the defendant; that it calls for pure matters of opinion, and that it assumes facts which have not been proved in some respects, and as to which there is no evidence.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

724 Ebeu E. Olcott.

A. From $902,000 to $1,375,000, based upon the two different sets of values given in the report and in your question.

C. And what were those two different sets of values?

A. One, a positive statement, is that the ore is worth at least $18 a ton, free milling gold, and that the value is taken in the calculations that are made on the various blocks of ore estimated in reserve and in sight. On that basis of $18 a ton, and $7 a ton total expenses, and on an amount of 82,000 tons
725 which are estimated—44,000 in one case and 37,000 in the other—it leaves a net profit per ton of $11. Eleven times 82,000 is $902,000.

Q. Then that was your figure, without allowing anything for the prospective value of portions not taken?

A. That is entirely outside of the value in the future. The other value, leading up to $1,375,000, is based on the result of a mill run, giving the value of the actual product as $23.78 per ton, and the net of that would be $16.78, and 82,000 times that would be $1,375,000.

Q. So that those two values are arrived at in this way: one of them is based on a value per ton of
726 $18, and the other on the value of $23.78?

A. Yes, sir.

Q. Then, this question is simply arithmetical; but we will get you to answer it. If an ore body 24 inches wide contains an ore reserve of 44,733 tons, how much would an ore body 18 inches wide, but of the same dimensions in other respects, contain.

Objected to by defendant's counsel as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert upon many matters which are not included in any statements of false representations against the defendant; that it calls for

727

pure matters of opinion, and that it assumes facts which have not been proved in some respects, and as to which there is no evidence to prove.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. Three-quarters as much—as eighteen is three-quarters of twenty-four, and that would be 33,000 tons.

728 Q. Assuming that the Good Hope Mine was opened up by two levels, each 950 feet in length, level No. 1 being 250 feet below the surface level, No. 2 being 100 feet below level No. 1, each being in the same ore body and connected with a main shaft 416 feet deep; and assuming that this ore had an average width of 18 inches, that it was not a continuous body, but pinched in and out in different places, so that one-fifth of the ground between the surface and the second level was barren ground, that beyond the north end of the apparent second level the level had been drifted not less than 80 feet in barren ground, the vein lost and nothing to indicate it extended beyond said north end, and 729 thereupon this opening into the barren ground had been closed up and concealed from view; and assuming, also, that beyond the south end of the apparent second level, that level, for not less than 150 feet, had been driven in barren ground, the vein lost, and no indication that it extended further than said south end, and that this extension of the south end had been closed up and concealed from view; and assuming that the ore in reserve in said mine did not exceed 33,550 tons, without deducting any allowance for said barren ground; and assuming, further, that the ore in sight did not exceed in quantity 27,999 tons; and assuming, also, that the average value of the ore mined did

730 Eben E. Olcott.

not exceed $11 per ton; that the cost of mining and milling it was not less than $11 a ton, and that there was no reliable record of what it had done in the past, and that the mining claims, of which this mine was a part, were 4,000 feet in continuous length, and were developed only as herein stated; on those assumptions what, in your opinion, was the fair market value of the property on the same date, January 1, 1894, including the mine?

731 Objected to by defendant's counsel as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert upon many matters which are not included in any statements of false representations against the defendant; that it calls for pure matters of opinion, and that it assumes facts which have not been proved in some respects, and as to which there is no evidence to prove.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

732 A. I should say that such a mine was, commercially speaking, valueless, on the basis that it cost as much to extract the gold as the total product of the gold in the ore.

Q. In the case last supposed, assuming that the entire cost of mining and milling was $8 per ton, what, in your opinion, would be the fair market value of the mine on the same date, and with the other conditions the same?

Objected to by defendant's counsel as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert upon many matters which are not included in any statements of false representations against the defendant; that it calls for

733

pure matters of opinion, and that it assumes facts which have not been proved in some respects, and as to which there is no evidence to prove.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

A. It would reduce the value $82,000, bringing it down to $820,000.

Q. But you have not answered the question. (Question repeated.)

734

A. That would leave a net value of $3 a ton.

Q. So that your valuation of the mine would be what?

A. It might bring it to $75,000, about.

Q. Is there any better method which you know of for determining the value and quantity of an ore reserve than by mining and milling it?

A. No, sir; there is not.

Q. Can its value and quantity be determined better, or not as well, by a year's run with your own men, or by a three days' run with the employees of the seller?

A. Naturally, by a year's run with one's own men.

735

Cross-examination by Mr. Johnson:

In making this estimate I have made a conservative estimate of the market price. I arrived at that estimate by multiplying the number of tons of estimated ore in reserve and estimated ore in sight by the estimate of the entire free milling gold in each, and subtracting from it the number of tons multiplied by the estimated cost of extracting it. A gold mill ought to mill nowadays three tons to the stamp; that is, sixty tons a days. It would take 1,380 days to mill 80,000 tons; about four years.

736 Q. Where is the profit coming out of this mine. You have taken as its market value the entire gold that is in it, less the entire cost of taking it out; so that the amount that you got out of it is the gross amount that is left after subtracting from the whole amount the cost of production, isn't it?

A. Yes, sir.

Q. So that after four years, the man who bought this mine would only get his money back?

A. 25 per cent. return on your money is pretty good.

737 Q. But it would take four years?

A. Yes, sir. I understood that there had been an examination of ore in this mine other than in reserve and in sight. It was stated that there were 4,000 continuous feet of ore, and that the vein was continuous 950 feet each way, and 416 feet deep. The opinion was on the unexplored ground.

I have known a great many sold beyond the actual ore in sight. I estimate the ore in sight by measurement first as to the ore blocked out, and then by carefully sampling as to the value of that ore. That completes the ore in sight, in my way of estimating, and in reputable correct practice. I
738 do not estimate ore an inch further down than the lower level, further than the ends of the levels each way.

Q. And if, in the questions that have been put to you, you estimated any ore below the lowest level or beyond the ends of the drifts, in either direction, your answer will be incorrect, will it not?

A. I am not answering as to whether I approve of the gentleman's method of estimating ore in sight, and your question turns wholly on that.

Q. If that assumption is the taking into consideration of any ore below the bottom of the lowest level, that should be thrown out, shouldn't it?

A. It should, in making a correct estimate; certainly. I am not talking about a correct estimate.

739

Q. And if your estimate takes any ore north of the end of the drifts, as they then appeared, that should be thrown out?

A. It might be, as a matter of precaution.

Q. You have stated that you did not, in estimating the ore in sight, take any beyond the workings in any direction?

A. I have said that I did not, and I do not think correct practice allows it.

Q. So that when you say that mines have been sold on the basis of the ore in sight, you mean correct practice as to ore in sight?

740

A. I do; or on the statement of men who have a reputation.

In examining a mine by shafts and levels where there are stopes over the levels, I measure the width of the vein in the face of the ore on the top and in the ends of the stopes. Nothing is figured in the ore in sight unless you can get to the four sides of it.

If the stulling and lagging prevents my examination of the roof of the level, I do not figure that in as ore in sight or ore in reserve, because there would be no stulls there if there was ore. The stulls would not be there until the ore was extracted. The stulls are never there unless there is ore removed, ordinarily speaking.

741

Q. Stulls are never put in to support the stopes, as they are carried up?

A. They always are put in, but the mere fact of there being a stull there shows that the ore has been extracted at that point, although it may not be extracted all the way up to the next level.

Q. Suppose you drive a level through soft ground before you stope it, do you or do you not have to stull or lag it?

A. We never call it stulled. To hold the earth up we timber the soft ground, which is entirely different from stulling, and lagging over that. You

always can examine the top of the level by breaking through the timbers.

Q. But suppose you do not break through and do not examine, would you or would you not figure it in?

A. Your hypothesis is not intelligible.

Q. Then you would break through and examine it?

A. I certainly would.

Q. In case an expert did not break through it and examine it, should he or should he not figure
743 it in as ore in reserve or ore in sight?

A. He should not figure it in as ore in reserve or ore in sight without examining it.

Q. In case a reputable expert, at the end of a level where there was no stope, but an upraise, came to a heap of refuse lying at the bottom of the upraise, what should he do in regard to that heap of refuse—assume that it is the end of the level?

A. He ought not to take any chances.

Q. Should he rely upon the statement of a miner that—"I don't know how much further that was driven; I was not here then, but think it was no more than three or four feet"—would be warranted in assuming that that was the end of the level?

744 A. No, sir; he would not.

Q. In case an expert comes to a planking, set up at the end of a level, should he or not assume that that was the end of the level?

A. He should not.

Q. Would the failure of the owner to notify him that that was not the end excuse him from investigation?

A. It would not.

Q. Would the failure of the owner to notify him that the heap of the refuse was not the end--assuming for the moment that such a failure existed —excuse him from making such an examination of that refuse heap?

745

A. It should certainly be removed. In examining a mine I should rather trust to the mill run than to the sampling.

The gentleman (Mr. Egan) says that he assayed every ten feet, or rather measured the ore every ten feet. He should sample it every 10 or 20 feet in the exposed face; as a matter of safety, it is generally considered that very high assays are discarded.

Q. Suppose you find, in examining a mine, that the vein runs sometimes along the foot wall, and sometimes along the hanging wall, and sometimes along both, but that it was continuous on one or the other, would you consider that a continuous vein or not, if the only breaks in it were by moving from one wall to the other?

746

A. Understanding your question, I would consider it a continuous vein, but not a continuous pay streak.

Q. Not even if the vein continued, as it were, across the fissure?

A. As it broke across the fissure?

Q Yes.

A. No, sir; I should not consider it a continuous pay streak.

747

Q. Although you could continuously extract pay ore from it?

A. Yes, sir. If it were broken, and only a little feeder running from the foot wall towards the hanging wall, it would not be considered a continuous pay streak.

Q. Could you determine on examining the underground workings of a mine whether the pay streak was continuous or not?

A. Yes, very distinctly.

Redirect-examination by Mr. Stickney:

Ore in sight should mean ore that can be ap-

proached at four sides. I do not know what this gentleman has considered it. That is my definition of it.

Ore in reserve is ore that is blocked out and ready to be mined.

By Mr. Johnson:

In estimating the ore in sight in this triangular block here, I would only do so after I had sampled the ore in the foot of the shaft, and on the bottom of the level. If the shaft was full of water I would
749 not estimate that as ore in sight. It is not proper to do so.

It would have been more cautious to have taken the samples from all sides.

Q. But suppose you had not done so, and had taken them from the shaft, and only a very few from the surface, would you, or would you not, be warranted in taking that block as ore in sight or ore in reserve?

A. I do not think we would be warranted in doing that.

By a Juror:

750 Q. I should like to ask if you were examining a mine what steps you would take to ascertain what parts of the mine the mill run came from?

A. You would naturally, personally, mark out a place from which the ore was to come. If it were a place where the ore could be mined by pick, you would personally throw it out, or have it done by an employee of your own; you would actually mine that ore yourself. If it was a case where the ore has to be blasted, which is very frequently, of course, you cannot see it come out, but you can direct where the ore shall be taken from, and you, with your own hands, are expected to take it up where it has fallen.

Eben E. Olcott. 751

Q. So that you not only select the place, but you try it on the spot?

A. Yes, sir; and that ore is generally sacked out and sealed.

Mr. Stickney: We offer in evidence the United States Mint returns of the bullion, being 52 in number.

Marked Plaintiff's Exhibit 27.

Plaintiffs rest.

752

Motion to Dismiss.

Mr. Wetmore: If your Honor please, I will state my motion to dismiss. I move to dismiss the complaint on the ground that the cause of action set forth in it has not been proved. The cause of action set forth in the complaint is, in substance, that the defendant, through one William H. Griffith, entered into negotiations with the plaintiffs for a sale to them of certain lands and mines, mining claims and appurtenances, and that prior to the 28th of December, the plaintiffs entered into negotigations for the purchase of said lands, and the defendant falsely and fraudulently represented to the plaintiffs the misrepresentations which have been stated by counsel for the plaintiffs in his opening, and did to the plaintiffs the fraudulent acts which are complained of. 753

I move to dismiss the complaint, upon the ground that this cause of action has not been sustained.

First.—Because there is no proof suffiicent to go to the jury that Mr. Griffith was in any way the agent of the defendant for the purpose of making the sale. but that it clearly appears that the relation was that of vendor and vendee

754 *Second.*—That the plaintiffs' sole contract, which was under seal, was with Griffith.

Third.—That at the time of Colonel Egan's visit to the mine there was no relation existing or intended between the plaintiffs Porter and Hobson and the defendant Sigafus; there is no evidence that at that time the plaintiffs, or either of them, had ever heard of Sigafus or of the Good Hope Mine.

Fourth.—That there is no evidence sufficient to go to the jury that the document which has been
755 called the Burnham report was the one to which Mr. Sigafus referred, and to which Colonel Egan referred, both intending the same thing. Any document of that name that has appeared in the case in their relations has not been identified.

Fifth.—That there was no relation between the plaintiff Morse and Colonel Egan, at the time of Egan's examination of the mine, that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan.

756 *Sixth.*—That there is no evidence that the plaintiffs in this case, as set forth in the complaint, relied in any manner upon the statements which were made by Mr. Sigafus.

And I move to dismiss, first, as against the plaintiffs Porter and Hobson; secondly, as against the plaintiff Morse; and thirdly, for the reasons already stated, against the plaintiffs not named, whom these plaintiffs claim to represent.

Motion denied. To which ruling of the Court counsel for defendant then and there duly excepted.

Sherman T. Crawford. 757

SHERMAN T. CRAWFORD, by deposition, in behalf of defendant, testified as follows:

I reside at Good Hope Mine, Riverside County, California. I have lived there two years, I know the Good Hope Mine property. I had a six months' lease on a part of it, which commenced on September 10th, 1895. I was in the Good Hope mine for the first time about eighteen months ago. I know the old second level in the mine. I know where the platform is, about 250 feet south of the old second level, and know how it is built. From what I saw it was built for stopping the circulation of air. It 758
was about three feet above the level of the ground. It stands right over the track; it was about ten feet long; a man could go under it. I crawled under it about a year ago. There was a track under the platform, and the drift runs in 100 feet or so further. There was nothing to prevent a person from getting under the platform. There was nothing only a drift in the ground on the further side when I went through. It was boarded up tight above the platform to the top of the drift, about five feet, I guess. The boards above the platform were put there to change the direction of the air.

I know Jepson; he was a millman in the mine. I 759
have had six months' experience in the work of millman; running rock through the mill, cleaning up the plates when there was and when there wasn't enough quick on the plates to catch the gold. Cleaning the amalgam and squeezing the quick out of the gold, running it through the amalgamator and retorting, what covers the general work of a millman. I have had an opportunity to observe Jepson's competency as a millman. I have seen him at mill work for the last year, off and on. I do not think he is a capable or competent millman. He does not tend to his work as he ought; he neglects the most important part of it, "goes off and leaves the mill without anybody being

there to attend to his work. That is all I know, that he don't attend to bis work. I know of loss occurring to the owners of the mine by reason of Jepson not attending to his duties. I have seen, at different times, dry amalgam going off of the plate, and I have seen quick going away in a trough leading to the waste dump, and I have seen the batteries get full of rock and the stamps falling down in the mortar, full of rock would cause it to break amalgam off of the chuck block and be thrown out of the screen, and, of course, when it goes out of
761 the screen everything goes into the waste that don't catch. I have seen him, at different times, melting bullion alone, which he said he was trying to make a ring out of. Every time he had the same story. Gold has been lost through Jepson's incompetency. I can't say how much in value the loss would be. During my term as lessee I had five clean ups altogether. The first was $141.41, the second $150, the next $290, the next $280 and the next $73. I ran something like one hundred tons on the third clean up. On the fourth I ran through something like one hundred and fifty tons and the last seventy-two or seventy-
762 three tons. The seventy-two tons represented twenty-six days' work. I had one partner then. We each got half after all expenses were paid. The $73 representing my wages and my partner's, after we paid all expenses, such as timber, powder, fuse caps, tool sharpening and 20% royalty paid the company, and $3 a ton for milling. This was taken out of the whole and we had $73 clear left apiece for 26 days' work. We were then working in the best lead in the mine.

Cross examination:

During my six months as millman, I worked some down in the mine, but I was in the mill every

763

day. Jepson was not working in the mill every day. I never ran the mill myself. I have had personal experience as a millman; I looked after five stamps which were running my ore through for myself for six months. I looked after them every day to see if any of our ore was going to waste and how the millman was looking after it. Mr. Jepson also had charge of those five stamps.

I did not do my work as a miner during the term of my lease; I done my work as I wanted to do it myself. During the six months I cleaned up the plates. I mean to say that I cleaned up the plates 764
every evening that I was there, that we were running our ore through, with the exception of seven or eight times that I was away, not exceeding two days each time, and we ran the stamps during the six months, off and on, to the amount of about one hundred days. I cleaned up the plates nearly 100 times. When the plates were dry and hard I can tell that quick should be put into the mill. I put it in the battery. When the plates are dry you want to put in more quick; when they are soft you don't want to put in any quick. You tell when the plates are dry by pushing your finger over them. There is always water on the plates when the mill 765
is running.

JOHN WILFORD, by deposition, in behalf of defendant, testified as follows:

I reside near the Good Hope Mine. I am a miner, and have been such off and on for 25 years. I know the Good Hope Mine. I have worked in that mine nearly all the time the mill was running, since the spring of 1886. I know the topography of the mine and the inside workings of it. There is a part of the mine known as the old 2d level. I know the platform 250 feet south on that level. On the old

second level running south 250 feet south from the main shaft there was a winze and a platform for a windlass. It was about 2 or 3 feet high above the car tracks. Above the platform the old No. 1 shaft came down there, it was boarded on the opposite side from the main shaft down one side. It was boarded up to the hanging wall about 4 feet From the car track to the top of the drift would be 6 or 7 feet. I was working in the mine when the platform and boards were put there. The platform was put there for the windlass and the boards were
767 boarded down the side for the purpose of turning the air down in the winze. The air would go back into this drift beyond the winze and would not go down as readily as if it was shut off from that drift. On the further side of the boards there was a drift which ran beyond some 80 feet or more. That was all there was. Mr. Doran caused the platform and boards to be erected. His object in doing so was to sink a winze. There was a curtain on the lower side of the windlass underneath—a person could crawl under the windlass platform and could thereby get into the drift beyond. I know Colonel J. M. S. Egan. I saw him at the Good Hope Mine. I was at the mine in November, 1893. There was a
768 mill run made that month. During the time of that mill run the weather was stormy. I know James B. Doran. He had been in poor health for several months prior to the mill run. I wasn't about the mill during that run. I believe the run lasted nearly a week. Doran hadn't been working for several months at the time of the mill run. I know what is called the old No. 1 shaft in that mine. The platform that I have testified to stands 350 feet down that shaft, is set directly underneath it. There was a strong draft coming down that shaft. There was too much draft, it melted candles too fast. The erection of the board shut off the

draft. The men who were sinking the winze and the men below used candles there.

Cross-examination by Mr. Crowe:

I never crawled under the curtain under the platform; I never saw any one else go back into the drift. If a man was looking around he might notice that there was a space to crawl in. The platform was 2 or 3 feet from the car track.

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JAMES R. CHEATHAM, sworn and examined as a witness for the defendant:

By Mr. Wetmore:

I live near the Good Hope Mine. I have been following mining for the last 17 years. I worked in a gold mine at Ivanpah, San Bernadine County, California, near Nevada. I worked at Calico five years in a silver mine. I worked at Oro Grande about six months in a gold mine; I worked at the Good Hope Mine going on six years. I was foreman of the mine in 1893. I remember Col. Egan's 771
visit to the mine in November, 1893. I went through with him all the way in his examination.

Q. You have seen that map that appears over there?

A. Yes, sir.

Q. Examined it?

A. Yes, sir.

Q. Is that a correct sectional view of the mine to the best of your recollection as it was when Col. Egan examined it?

A. Yes, sir. Going north for about 85 feet in the first level the stopes had been opened and carried up to a height of about 35 feet, I think; and

from there there was barren ground for about 50 feet. Some of it was stulled and some lagged; when it was not stulled or lagged it was open. Then going north to the next manway the stopes were open for a distance—well, 400 feet anyway. Then there was a lagging, a barren place in the vein, about 175 feet, I suppose. There was about 30 feet of it from where the stoping had been carried that had not been lagged. The stulls had been put in and the rest of it was all stulled up. It was wet. It was stulled and lagged and filled
773 in. The ground was very wet and rotten. It had been stulled probably a year before in the regular course of operation. There has been some little stulling and probably a little lagging just the other side of the barren place. The walls were sufficient to put head-boards against to hold the head of the stulls, and it did not require square setting to hold the weight, the filling back of the lagging. That was the cheapest way to treat that part of the level for the purpose of securing it. If the stulling and lagging had not been there it would have all caved in and shut the level up. The pay streak showed in all the stopes as far as we had gone. Wherever
774 there was any pay streak it showed all over the chutes of ore in the level, and appeared all through the level at the side. The track was laid on the bottom of the level, and a foot-board on the track between the rails. Then there was whatever distance there might be on the right and left of the track, between there and the walls. The vein along that first level and in the stopes varied from six feet down to six inches; that is, in the pay streak. It tapered down to nothing and then came in again. I never heard any part of this pay streak designated as a kidney before this suit. Sometimes the pay streak is on the foot wall and sometimes on the hanging. When it comes out on the foot it is nearly sure it will be on the hanging wall. In no in-

775

stance did it go where we have to reach it by cross-cut. I went through the mine with Colonel Egan all the time he was there. We were three days examining the mine. We were in the mine once during the mill test. Colonel Egan went through the first level. He took samples there. He selected the places. He did not ask me to remove the boards in coming to that place of wet ground. He might have asked me if there was ore, and I referred him to the bottom of the level. You could see it on both sides. I told him as far as I could see there was no ore. The bottom of the level would show the char- 776
acter of the ground. I never saw him measuring anything, only the level. He measured the length of the level. He made whatever measurements he desired. The first level south the stopes were opened all except about 50 feet next to the shaft, that was caved in. A person could not get in there at that time. We did not go down the old working shaft there, shaft No. 1, the south shaft. Egan took samples where the cave-in was. In the second level north, after going about 50 feet, the stopes were open and then there was a barren place, but not stulled. There may be a set of stulling or two in there. There may be a little lagging in places 777
along; it could be seen. Then we come to the upraise, between the two levels. The stopes were opened back then. We went into the stopes. The stopes were all open except one little point about 15 feet that had caved, all the way to the next barren place. It was hard ground. Part of it had stulls in without any lagging, and the rest of it was lagged and stulled and filled in. It was visible upon inspection what the ground was. Beyond that, at the end of the level, the stopes were open for about 30 feet back of the first chute (indicating), and the vein splits just back of it. The foot wall takes to the right and the hanging wall to the left. There is a big horse between the two veins, and the horse

778 comes to a point up about 20 feet in the stope, about 20 feet off of the level. I guess I have got a little too far back there with the split in the vein. I think it was up at the next chute. The vein splits, and one follows the foot-wall and one the hanging wall. The drift had been drove on the hanging wall about 100 feet from there anyway. I did not know how far that drift ran at that time. I was not there when they started the raise back in the drift and it cut me off. Colonel Egan asked me if that was the end of the drift. I told him it was
779 not. He asked me how far in it went. I told him I did not know. He asked me how it looked in the face of the drift, and I told him it looked just the same as the upraise looked. There was no ore in it. We run that raise up on an incline, and connected with the first level above. The two veins come together up about 20 feet. Then we ran a blind drift where the two veins come together. Johnny Wilford was working there. The veins came together and the drift went straight ahead. Since then it has been followed out, it goes straight ahead to the north.

The ground was all stoped out the last time I
780 was in there, from there clear up to the other level, for 50 feet or more ahead of that. I don't know just how much ore there was ahead of that, but I understood there was a big body of ore back. What I do know, there was between three and four feet of ore all the way along that blind drift which we had drove overhead. It was very good ore.

By Mr. Weimore:

Q. (Exhibiting model.) Is this a correct sectional model of the mine, as it was at the time Col. Egan visited it?

A. Yes. I have examined it coming down to the north end where the pile of debris was. At the time

of Colonel Egan's visit they were running waste from this pile in the north drift; the cars were taking it from there at different times in day when they had time to run. The man that was working in the drift above threw all his waste down on this pile and ran his ore back into the chute. There was no chute for any ore at that place, and as the man worked above it, some of the waste fell on to the pile. The upraise had been run about 15 feet, and the man when he drove his blind drift broke though into the top of the upraise, when he got over it and made a hole through to put his waste down. The 782
pay streak was up in the drift where the two veins run together—the foot wall and hanging wall; they came together right in the bottom of the drift; there is where Wilford was working. They had run off the track in following the hanging wall below. This blind drift was right in where the two walls come together, where they separated going down. From there the pay streak was subsequently worked off north. It is at present. Coming to the south end from the main shaft south on the lower level, the stopes were all open clear to the shaft. At the south shaft there was a platform set up over the main drift, below that a winze was sunk down between thirty-five and fifty feet some where. I 783
never measured to the bottom of it, it was full of water. There was ore in it. There was a platform set over the top of this level, and we put it up about three feet, for the purpose of running the windlass, so that when we run the car up we could dump the bucket in the car. The platform was over this winze, about three feet high over the car track, and it was put up for the purpose of running the car up to the platform, so that we could dump the loaded bucket in it when we were windlassing it out of the winze. It was the dirt out of the shaft—either ore or waste, whatever we had—from the winze, down below the level.

Whatever we took out of the winze we brought up on the platform and dumped it on to the car on the north side.

When they were at work in the winze we put some boards overhead, and down on the sides, and connected with the top of the platform, so as to turn the air around under the platform—the air that came down the old south shaft—and that would draw the smoke out from the bottom of the winze when they would fire, when they were drilling their holes. We had some gunny sacks tacked
785 up to the top of the platform, and we would let them down so that the cold air would not pass under, as it might be too cold down in the shaft. The air then would go through a hole up in the stope, and down into the level, and on through the mine. The boards that made this hole were set up overhead; about five feet, I suppose, up in the shaft. They cover this opening up the south shaft, except a space of about six inches on the south side. The boards were nailed to the end, and that left a space in between the wall of the shaft of about six inches, and that turned the air down. Some gunny cloth hung right on the south side of the platform,
786 so as to close down when they were drilling in the bottom of the winze. We hung it up as occasion might require. The track crossed the winze—runs right straight through into the level. It was six feet across the top of the shaft, and there was a tie set on that side and one on this side to support the rails and keep them from spreading, and the iron rails reached right across there, and then there was a board laid in between the rails to walk on. The track going from one side to the other went across underneath the platform. It ran on into the drift south. When we were extending that drift (south) ahead we followed the foot wall, which carried us into a dike that crossed the end of the vein and splits the vein up. We ran into that straght ahead,

I suppose, 25 feet from the shaft, and it got so hard that we quit it, and came back about 15 feet, where there was a small streak of ore turned to the right on the hanging wall, and we followed that out, which carried us out around the edge of the dike about 150 feet. That had been run out about 150 feet. The ore was small, but it was pay ore. The dike is what shows on the surface all along the east side of the vein, and on the west side at the south end—that is, from a line of the vein on the south end. A dike is rock that bears no ore; foreign rock. It is a black, hard granite I would call it. 788 They came back and took this drift, and went around the edge of the dike. There was only one prominent slip in the drift. The vein widened out at one place about twenty inches, and then it would narrow up, and then widen out again; and there was one wall that was very prominent, and we drove and broke into that for track room, so as to lay the car tracks, and the hanging wall might be broken in different places, where it would come in close. We broke this drift along the hanging wall from place to place. We broke into the other side —the side towards the foot wall. There was only one wall. It may have been a foot wall or it may not have been. The two walls were up that close 789 together (indicating). There was only one prominent wall. The west wall was soft; it was not so prominent as the other. I was in the mine a number of times with Colonel Egan. I guess a dozen times. Three days all the time, and I think he was in the mine twice—and not over twice—during the time he was waiting for the mill run to be completed. We talked about different things and different places in the mine all the time we were in there, and we came back then to the main shaft, and while we were waiting for the skip he says, "I will tell you what let us do; let us go down and go down in that old south drift." I said all right, and we

790 went down, and we went under the platform, and went clear back to the face of the drift. He took a couple of samples, and I panned them for him He took two samples just simply to be panned; he didn't take any for assays. I remember the mill run. Mr. Sigafus told me that they wanted a mill run that morning at the shaft before I went down, and he told me to stop them from sending up any more ore. So I went down and put the car man to cleaning up the track, and I told the men to keep the ore in the stope, and not put it in the chute until I heard further about what was to be done.

791 Then I went on top, and I met Mr. Egan, Mr. Griffith and Mr. Sigafus at the shaft, and Mr. Egan or Mr. Sigafus, one or the other of them, and I won't say which one it was, said they were going to have a mill run, and Mr. Egan spoke up and said, "Yes; and we have decided on three cars for a ton—three full cars of clean ore"; and he said, "Let us go up on the dump." Mr. Sigafus told me that I was under his (Egan's) charge, and he had full control of the mine for the mill run. We went up to where the skip dumps into the car that goes to the mill, and he measured the car. There was a platform which led up to where this skip dumped into the car.

792 We walked up the platform and out to where the car was and he measured the car and asked me how much I thought it would hold, and if I thought three cars were too much. I told him I thought it was. He said, "Well, never mind, anyway, it is immaterial about the mill run," and that he went altogether on his samples, anyway. He said he simply wanted to see how close the mill would save the gold—how much free gold and how much sulphurets was contained in the rock. He simply said that he wanted good ore. He said he would leave it for me wherever I wanted to break it. He said he wanted to test the ore to see how close it would save the gold, and also to see how

much free gold there was in the rock, and how much sulphurets.

Q. Where was the ore taken from?

A. Some of the ore was taken in the stope at the north end of the first level. We were just stoping a little overhead back of the end of the drift. I think we got three carloads there, and we got in a stope back south, about 100 feet. Then we got some next to the main shaft, right up next to the shaft. We got some in back where there were some sacks. Further along north. Then we got some on the south side of the level. There was one 794
man there. Then we got some on the lower level on the south side. There were five miners working. We took ore from the spots where every man that was mining was engaged in taking out ore. I selected the place where they shou'd take out the ore. We sent up some sacked ore; the sacks were about 20 inches long and 12 or 14 inches wide. They were sacks that had been put there some time previous to that—probably a year before that—and there hadn't been any one working in that part of the mine since. The sacks were taken out in a rough place where the ground was broken and there were big boulders laying all around in front 795
of the chute. There was nobody working there, and there was not a carload of them, and all the ore that was taken out at this place at this time was all sacked. They would sack it and put it right into the chute, and if there was more than a carload the sacks were set to one side until the car came back. We had to carry the sacks to the chute and pour it in. The sacks had been left there for that purpose. There were from six to ten sacks, I think. They sacked all the ore there that they took out of that place while they were up at that distance—probably a dozen cars. The cars would hold 25 sacks. The difference between shoveling the ore there and in the other chutes where we did

796 shovel it was we would have had to throw it on the waste if it had not been sacked; there was no foot wall to throw it on. The chute was very flat, and we had to raise the chute off the foot wall, and we filled in, in the back and front of it, with waste; it was big, coarse waste. The waste ran up for probably ten feet above the mouth of the chute. So we were working right around in the stope, and the ground had all been filled in at the time on the north side of the chute, and we had to shovel it, at least twice, anyway, if we got it into the chute.

797 There had been no men working there for a year at that place. A great many sacks had been taken up from the place, and six or eight were left standing there. I don't know of any other place that we sacked any ore in the mine up to that time. I sacked some of it for the new company when we were running and making a connection with that raise from the stope up to the surface, indicating the old north shaft. These sacks hold probably 30 or 40 pounds apiece. Colonel Egan went around and saw where everybody was working. I told him there were two or three places in the mine that there was ore broke, where there was no one working, and would he send that up. He asked me if it

798 was good ore, and I told him that it was. He said, "All right, then, send it up." He did not point out to me any particular place where he wanted ore taken from. We took ore from every place where a man was then working, and these sacked ores where there was nobody working. There was one other place on the south side of the shaft on the upper level. There was some ore broke on that side, and we simply sorted it and put it in on the upper level. All the ore for the mill test was sorted in the mine. The custom was for them to keep it mined as clean as it could be, and then it went to the mill, and the man that ran it through the crusher always sorted the ore. It had not been the

habit before to sort the ore down in the mine. He wanted good clean ore, and that was the only way we could measure it. If we had sorted it at the mill we couldn't have told anything about how much went into the mill. The tally was kept on top, and in the mine also. The tally was kept of the skips. The skips filled all the car would hold, and sometimes a little more. There were two small cars on the first level, and two cars on the lower level, the same size of the car that run from the dump to the mill. The car man would fill both of the small cars and run them to the shaft, one on each side. When he got to the skip he would dump one of the small cars in and half of the next one. That would fill the skip and he would send that up. Then he would run his empty car back and get a load, and when he got to the skip again he would dump this car in it, and the rest of the other car; all that came up in the skip was shoveled into the car and carried to the mill, and a tally was kept of the skips. I know Cocking. I did not rub off fifteen marks, or any marks, from his tally. I never said a word to him about any cars. I did not have any quarrel with him. I took one from Whitten's tally.

The evening of the snow we were running up the ore for the mill test, and he had run a car up and marked it—the last car that was run up that evening—and he asked the boy that had been in the habit of sorting the ore in the mill to run it out and dump it. The boy started out with it, and there was snow all over the track, and he ran between the frog of the switch with this car and it tipped over and dumped the load of ore off the track down about 12 feet on to the ground; the car and all went over. The next day I asked him if he had marked the car, and he said he did—the car that was dumped over. So I told him to mark it off, that it was lost there. I supposed that he had marked it

802 James R. Cheatham.

off all right, until I was looking over the tally and I didn't see where he had marked it off. So he was putting some coal under the boiler and I went down where he was, and I asked him if he had marked that car off yet. He said no. I said, "I will go and mark it off myself." And I took it off. Sixty-two skips were sent up.

Q. And this car that you marked off was the 63d, was it?

A. Yes.

These tallies were kept on a piece of cardboard—
803 the cardboard that comes in between candles—yellow cardboard, with a lead pencil. I gave them to Colonel Egan. Before I gave him the tallies, I says, "There is a car or two over 60 cars"—we were to run 60 cars, and before I noticed it they had run up too many, and I asked him what we should do about it, and he said, "Oh, it makes no difference, let it go"—just that way (indicating). I have worked in this mine about five years, and been in it off and on since I quit there.

I never done any assaying; I have panned a great deal of it; I guess I would average ten pans a day—ten samples.

Q. As a practical miner, are you able to form an
804 opinion as to the ore, so far as the mine had developed up to that time and showed how the ore was running; I mean the amount of free milling gold per ton?

A. I could come within a few dollars of it?

Q. According to your judgment what did the ore run?

A. I should judge it would run from $15 to $22; I don't know just when the mill run began, whether it was on the evening of the 17th or on the morning of the 18th, but it ended on the afternoon of the 24th. During the mill run I did not give instructions to any one of the miners to put better ore on top, or in any manner,

805

shape or form to conceal the character of the ore from Colonel Egan. There are rich places in the mine. They are just simply rich places that come in the lead (the pay streak). You find one here, and maybe you go along ten feet and you find another, you may find it up and you may find it down. I have seen ore that would run $500 in places. You will find them in any place; sometimes you will find the richest part where there will be a pinch in the vein. Then, again, you will find it where it is big, and you will find it where it is getting small—just wherever you happen to find it.

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Q. Had the mine been changed in any respect, and if so, in what respect, at the time Colonel Egan went into it on the 17th of November, 1893, from the day when Mr. Luckhardt examined it on the 5th of July, 1893?

A. No, sir; it had not been changed any; that is, the stope.

Q. What work had been done during that interim?

A. That north drift had been run ahead some, and the stope had been run ahead some.

Q. How long had this platform that you have spoken of been up?

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A. Over a year.

Cross examination by Mr. Stickney:

I worked there almost continuously up to May, 1894. I was probably off a month at a time, occasionaly. In the last part of the time I was foreman underground. I was an experienced miner. The men who worked underground in that period were under my orders. There were then five months of Egan's period.

When Egan was there he simply ran the mine himself. We got out ore as fast as we could, and where we could get it out to the best advantage.

By the Court:

Q. Won't you explain how there was any difference, if there was any, and in what the difference consisted, in the way the mine was operated after Egan came there and the way it had been done by you previously?

A. If we got a little behind in ore he would want us to send up the whole thing, waste and all, out of the vein.

Q. How is that?

A. When we would get behind he would want us
809 to send up the whole business—let it all come. If we didn't have enough ore to keep the mill running 24 hours, a 20-stamp mill.

Q. There was a new mill put in?

A. Yes, sir.

Q. There was a new mill put in?

A. Yes, sir.

He hired every man that came along, whether he was a miner or not, and if I fired him he would put the man back to work; that is, if he was behind in ore. He had a great many inexperienced men in the mine for that reason. From 50 to 65 men were in the mine, and a great many of them were inex-
810 perienced. I guess about half that were there were not fit to be in the mine.

Q. Then he seemed to be trying rather to work the mine badly?

A. No, sir; he wanted to make it pay if he could. That was his best judgment, that is all.

Q. His judgment was that it was better to hire inexperienced men, who knew nothing about mining?

A. No, sir; but he simply thought they would do about as well as good men. He acted as though he did. I don't think he had had any experience in gold mining. I considered from the judgment he used he hadn't. I know he testified he had had experience in silver mining.

811

Q. Do silver mines differ from gold mines to respect to employing inexperienced men?

A. Not very much.

Q. You were superintendent of the whole mine, weren't you, during the time that Mr. Egan was there to make his examination?

A. No, sir; I was foreman over the men. I had nothing to do with the mill. Except as Mr. Sigafus, the owner, was in charge, Mr. Jepson was in charge of the mill. He had been around the mill off and on ever since the mill started.

812

Q. Was there any crooked work done about that mill run in any way, manner, form or shape?

A. Not that I know of. I would have known of it if there was anything wrong in the mine. I don't think it could have gone on without my knowledge, but not around the mill.

Q. Do you admit that there were some sacks of ore there?

A. Yes, sir.

Q. How many?

A. From six to ten sacks.

Q. Weren't there more than that number?

A. I don't think there was. The best recollection I have is from six to ten sacks?

813

Q. Have you ever said there were 15?

A. I don't know that I have.

Q. Will you say that you have not?

A. No, sir; I don't say that I have not.

Q. Well, if you did so state, was it correct?

A. I don't know whether it would be or not.

Q. You don't know that it would be correct even if you said so?

A. If I was under oath and I sa d so, it would have been so.

Q. You draw a distinction between telling the the truth when you are under oath, and when you are not?

A. Yes, sir; according to the circumstances.

814 Q. Then there are times when you do not tell the truth; is that it?

A. Yes, there might be.

Q. Who had to do with these sacks of ore, such as they were; who was the man?

A. Miller.

Q. Emanuel Miller?

A. Yes.

Q. Anyone else?

A. Nobody else handled the sacks of ore.

Q. Who had got out the ore and had those sacks
815 in his charge, if anyone?

A. I know who broke the ore.

Q. Who?

A. Kingsbury.

Q. And who had put the ore in the sacks?

A. Kingsbury.

Q. You know that we read Kingsbury's deposition on that point, don't you?

A. Yes, I think you did.

Q. You heard it read, didn't you?

A. I heard it. I have read it, too.

Q. Did you ever see the ore that was in those sacks yourself?

A. I never saw it only just from the top of the
816 sacks.

Q. You saw it in the tops of the sacks?

A. Yes, sir.

Q. What quality was it?

A. It was hard ore.

Q. Did you think that that was the point I was asking you about?

A. It might be that you were asking whether it was rich or poor, soft or hard.

Q. But did you understand me as wanting to know that when I asked you about the quality of that ore; what did you think I meant?

A. Well, go ahead and ask me.

Q. What did you think I meant?

817

A. I answered you what I thought you meant.

Q. What did you think I meant when I asked you what quality of ore that was?

A. I answered you just what I thought you meant.

Q. What did you think I was after?

A. I didn't think. I just simply answered the question. If you had let me alone I probably would have explained it further, but you went and cut me off.

Q. Now, won't you answer my question; what did you think I was after?

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A. I was going to explain the ore to you. The ore was hard in the first place, and I considered it pretty good ore.

Q. How good?

A. I don't know.

Q. You have no idea?

A. I haven't the least idea. It might be a twenty dollar ore, or a fifty dollar ore, or a fifteen dollar ore.

Q. And it might have been $500 ore?

A. Yes, it might have been.

Q. What was it, according to your best knowledge?

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A. I don't think it was $500 ore, if it had been, I don't think it would have been there.

Q. Have there been any times when you have made statements that were not true as to the number of those sacks?

A. I am sure I don't know.

Q. Search your memory a little on that point?

A. Oh, I have an idea about what you have reference to.

Q. If it had been a $2 ore, it would not have been in sacks, would it?

A. Yes, sir; it would, just the same; no difference what grade it was.

Q. It would have been in sacks and kept there for a year?

A. Yes, sir; it would have been kept there as that ore was kept there, just for the simple reason that there was not a carload of it.

Q. I will ask you again, to your best knowledge, recollection and belief, what was the value of that ore?

A. I should judge it was $20 ore.

Q. Is that the best answer you can give?

A. If it was as good as some ore that I broke
821 from where that came from. I saw a great deal of ore that was broke from where this came from. I never panned a piece of it, but I am only judging from where it came from in the lead.

Q. Judging from all the knowledge at your avail, from all the informatien that you had as to where it came from, from your own examination and everything, I would like you to state with a great deal of accuracy, the utmost that you can give, what was the value of that ore, in your best judgment?

A. Well, I wouldn't like to state.

Q. I would like you to?

A. I have told you that I wouldn't put it over
822 $20 to be sure of it.

Q. You wouldn't put it now over $20, to be sure?

A. No, sir.

Q. But I do not make you that limitation. I ask you to give me your best recollection and judgment?

A. Well, that is my best judgment.

Q. Have you ever put it at any other value?

A. I don't know.

Q. Did you ever state to any one that it would run $40?

A. I don't know that I did; I won't say I haven't.

Q. If you did so state, was it true?

A. I don't think it was.

Q. And you knew it was not true at the time you so stated, if you said so?

A. Well, I might.

Q. How is that?

A. I might have thought it was a little higher grade if I said so; but I don't say so now.

Q. If you said so then, you did think so then, didn't you?

A. I might have.

Q. Did you or not?

A. I don't know what I thought. 824

Q. What did you say about that ore to Manuel Miller?

A. I told him to put that ore in the chute, because we were going to run it into the mill. I told Cocking to call at that chute and get the ore that was in it.

Q. Get this particular ore that was in sacks?

A. Yes, sir; that was the only ore that went into that chute.

Q. You had left it there for a full year. That is so, isn't it?

A. I had no occasion to run it out myself.

Q. Answer my question, please. You had left it 825 there in the sacks for a full year?

A. Yes, sir.

Q. And then when Mr. Egan was making his mill run, you directed these men to send that ore up?

A. Excuse me——

Q. That is the fact, isn't it?

A. It is a fact that it was left there for some time. I did not say a year, though it might have been a year.

* * * * * *

Q. And when Colonel Egan came there to make his mill run you directed this ore to be sent up to the mill, didn't you?

A. Yes, sir; that is right.

826 James R. Cheatham.

Q. Who told you to do that?

A. Nobody.

Q. Did Mr. Sigafus?

A. Not the particular sacks.

Q. Did anybody say anything to you about it?

A. About the sacks?

Q. Yes. What did you suppose I was asking you about?

A. Well, what is your question?

Q. My question was: Did anyone say anything to you about it; that is, about sending those sacks
827 up?

A. No, sir.

Q. Are you positive about that?

A. Yes, sir.

Q. Refresh your memory a little. Did not Mr. Sigafus say something to you about it?

A. No, sir.

Q. Do you testify to that positively?

A. I did testify to it.

Q. Do you now?

A. I testify that he never said anything to me about the sacks.

Q. Have you at any time made a statement at variance with that?

828 A. I don't know.

Q. Have you at any time made a statement that Mr. Sigafus gave you direction to do that?

A. I don't know.

Q. If you made such a statement, was it true?

A. I don't think it was.

Q. Then why did you make the statement?

A. Well, I have got my reasons for it. If you want me to explain them I will tell you.

Q. You may explain and say all you like.

A. Then I will tell you the whole business.

When they were getting, not depositions, but statements, from miners around the mine, they came to me. Mr. Jones was there. I was at home

running a boarding-house. The company had been behind with me from $300 to $1,700 for the last year, and, of course, I couldn't say right straight out that I would not have a talk with him, and wouldn't make any statement. I told him I wouldn't make any deposition to anything I would tell him. About nine o'clock one evening, I was just going to bed, and Mr. Wilson came after me, and he said, "I would like to have you go up on the hill and have a talk with Mr. Jones." I told him I was just going to bed, and wouldn't it do some other time. He says, "No, he is busy, and 830
has been busy, and he would like to see you to-night." I says, "Colonel Egan is up there, and Colonel Egan is interested in the Alice mine with me, and furthermore, I don't want to make any enemies between myself and Egan under the circumstances. I had explained to Mr. Wilson before that I thought if he could get any action at all it would certainly be against Colonel Egan, as he had the whole to say about the mill run and everything connected with the mine during the mill run." So he said, "All right, come on and go up anyway, and you needn't tell him anything where he can connect on at all." So I went up with him, and we had some beer and some whiskey. We took a 831
drink of beer, and Mr. Jones got up and told a few stories. Then pretty soon we had another beer—or, I don't know whether it was beer or ale, but it was one of the two—and Colonel Egan got off a yarn or two. They kept that up for about an hour, I guess, and I told them that if they wanted to talk to me they better get at it, because if they didn't, I wouldn't be able to talk. So we started in to talk about this business—this mill run. Before we started, though, we had another little drink of whiskey. I think the beer was all gone, if I am not mistaken, or the ale. That was the way the whole performance went.

832 James R. Cheatham.

Q. Now, have you given all the explanation you wish to?

A. Yes, sir; that is all for the present.

Q. You did tell them something about this mill run, didn't you?

A. Well, I wouldn't swear to anything that I told them.

Q. What is your best recollection about it?

A. I think they must have asked me something about it, as that was the main thing they were after.

There were tally-boards kept of the number of
833 cars that went up, at three points. One was on the lower level, one on the first level, and one at the highest. The one on the lowest level kept a tally according to the loads that left that point, and on the first level of the loads that left that level, and the man at the surface kept a tally of all that came up.

Q. Was there any question between you and any of those men as to the number of cars that came up?

A. No, sir, no question at all, except with Whitten, who marked one load off from his; that was all.

Q. And that was the only alteration of any kind
834 that took place in relation to the tallies?

A. Yes, sir.

Q. What do you say Egan's directions were to you about the parts of the mine that the ore was to come from?

A. I told him where the men were working; that they were scattered out pretty well, and asked him if he wanted his run from any particular place. He said he would leave that to me. I said the men were scattered out pretty well in the mine, and that if where the men were working would do. He said, "All right, that will do." I said, "There is some ore that is broke in two or three different places in the mine that we can get and

put in." I told him every place the men were working, and he saw the men working. 835

Q. What did you understand him to be making that mill run for?

A. To see how close the mill would save the gold; that was all he said he wanted.

Q. What ordinarily is the purpose of a mill run when a man is examining a mine?

A. Under the circumstances——

Q. (Repeated.)

A. To see what the ore will mill.

Q. At the time Col. Egan was there did you suppose he had any other purpose than that? 836

A. He told me that he did not have that purpose by taking three cars to the ton, and I told him it was more than a ton; but he still wanted it anyway.

Q. He told you it was not his purpose to find out what the ore would produce?

A. No; he didn't say that it was not his purpose.

Q. But you said so a moment ago.

A. No, I didn't. I said he didn't tell me that was his purpose.

Q. As I understand you, you say he told you to send up good ore? 837

A. Yes, sir.

Q. Did you understand then that was his purpose—to get good, clean ore?

A. Yes, sir.

Q. And you really believed that he did not wish to get an accurate idea of what the ore in that mine would run?

A. I didn't think he did.

Q. You didn't think he did?

A. Not when this mill run was made.

Q. If he was examining that mine in the interest of purchasers, or with the idea of getting honestly a knowledge of its value, he would have wanted

to know the average product of the mine, wouldn't he?

A. I would, and I would attend to it.

Q. And you believed at that time that he was not trying to get at that?

A. I didn't think he cared about that part of it. He didn't say so to me.

Q. Did you believe he was trying to get something else?

A. I just thought he was trying to run the ore up, that is all—trying to run the grade of the ore

839 up.

Q. You mean to get it better than it really was?

A. Yes, sir; I did think so.

Q. If he was examining it for purchasers, then you thought he was trying to betray his principals back of him?

A. That is what I thought.

Q. Have you ever stated that before?

A. I don't know.

Q. At the time you made this statement that you have been speaking about, did you say anything of that sort?

A. I don't know that I did. No, I wouldn't have said that, I don't think.

840 Q. Can you name now a reputable responsible person to whom you have ever made that statement before?

A. I don't know that I ever did.

Q. Did you examine the amalgam that came out of the mill?

A. No, sir; I saw it after it was retested, I saw part of it when they were cleaning up. I went into the mill once.

Q. Did Mr. Sigafus say anything about what he wished this mill run to produce?

A. No, sir.

Q. Did he say anything to you to the effect that he wanted that mill run as high $30 a ton?

A. No, sir.

Q. Have you ever said that he did?

A. Not that I know of.

Q. Did you put in any high-grade ore into that mill while the ore was running through?

A. No, sir; no more than what came out of the mine. It was pretty good ore; it was fair average ore.

Q. How did it compare with what you had seen at other times?

A. It was not as good as I have seen go through the mill.

Q. Did Mr. Sigafus say anything to you about 842
the mill run after it had taken place?

A. After which?

Q. After the mill run had taken place. Do you understand me? Is my question obscure?

A. We talked about the mill run and about the examination. I don't remember just what was said.

Q. About the mill run. You know what mill run is?

A. Yes.

Q. And you know Mr. Sigafus?

A. Yes.

Q. Now, the point I am trying to get at is, whether Mr. Sigafus, after the mill run was over, 843
had a talk with you about it.

A. Yes, sir, I think likely he did.

Q. What did he say?

A. I don't remember now what he said.

Q. Search your memory, because this is an interesting point. Can't you remember at all?

A. I couldn't state anything particular that he said about the mill run.

Q. State anything in general?

A. No, I couldn't.

Q. Give us anything that is in your mind that he said at that time about the mill run?

A. No; I couldn't swear to anything he said.

844 Q. Did Mr. Sigafus say to you he was afraid the mill run had been too good?

A. No, sir.

Q. Do you know how good it was?

A. No, sir, I don't.

Q. Do you know that it ran about $36?

A. No, I didn't know that it ran $36. I knew the amount of amalgam that came out; I saw it weighed.

Q. Did you never learn that it ran about $36?

A. I know that it did not.

845 Q. You know it did not?

A. Yes, sir; a ton; that is, actual weight.

Q. Did you know that the mill run showed up higher than the ore would average from that mine?

A. No, sir; I did not.

Q. Have you ever said that you did?

A. I don't know that, whether I did or not.

Q. And if you said so, was that statement true or not?

A. It was not true.

Q. Had not the second level been run north for quite a distance into barren ground?

A. Yes, sir.

846 Q. And then hadn't it been filled up so that it did not show?

A. There had been a raise started up and there was a pile of dirt that dropped down into the level.

Q. So that, at the time Egan was there, that concealed this distance to the north, where this second level had been run?

A. Yes, sir.

Q. And that was in barren ground?

A. Yes, sir.

Q. How far south had the second level been run from that point where the planking was?

A. About 150 feet.

Q. Was that in barren ground?

A. No, sir; not altogether.

Q. It was to some extent?

A. No; there was a vein all the way; a small vein. There was one place there, about 20 inches, that I remember measuring myself, and it would narrow up and widen out; sometimes it would be three inches, sometimes six. There had been no stoping done in that 150 feet south. It had not been closed up; It was partly close.

Q. You say you crawled in there with Egan?

A. Yes.

Q. Do you remember that Egan swore that that was closed up, and that he knew nothing about the 848
level having been run to the south there?

A. Yes, sir.

Q. And you now tell me on your oath that you and he went in there?

A. Yes, I took him in to the full distance.

Q. Have you ever made that statement before?

A. Not that I know of.

Q. Have you not stated before that there was nothing there in that mine where that second level was run south and that it had been closed up? Haven't you made that statement?

A. Not that I remember of. It was not true if I said so, I guess. 849

Q. You know what gold concentrates are, don't you?

A. I do know what concentrates are.

Q. Did you ever see with your own eyes gold concentrates put on any portions of the ore in this mine by artificial means?

A. I never did. I have seen some that I thought might have been gold sulphurets. I have scraped some of it off.

Q. You were not deceived on that point, were you?

A. I have examined it and found to my own satisfaction it was not. I have seen lots of gold concentrates.

Q. And did you ever see them in such a place as you saw them in that mine?

A. I don't know that they were concentrates. I don't think they were now. I thought they were at that time, but since examining them I think they were not. At the time when I first saw them they looked to me like sulphurets, oxides.

Q. What has produced the change of opinion on your part?

A. I examined the mine and found that it was from the water running from the redwood timbers
851 down on to the vein and across it, and it colored it red.

Q. What kind of redwood timber was that that ran sulphurets of gold?

A. Ran sulphurets of gold? It didn't run sulphurets of gold; it just stained it—the redwood.

Q. But at the time you thought it was sulphurets of gold?

A. Yes, I did.

By the Court:

Q. Where was that?

852 A. On the lower level, north.

By Mr. Stickney:

Q. And when was it that you saw on this ore body what you then thought was sulphurets of gold?

A. I have seen it there for two or three years at different places in the mine. I had not examined it very closely. I spoke to Mr. Kingsbury about it once when I first saw it.

Q. You have alluded to an occasion and described it at some length when you made a statement of some sort?

A. Yes, sir.

Q. Did you put your name to it?

A. I think I did.

Q. Have you any doubt of it?

A. Yes, I have some doubt of it.

Q. You have some doubt of it?

A. Yes, I have.

Q. Why didn't you say so in the first place?

A. I said there was a statement I thought that you had reference to, that I was explaining.

Q. Why didn't you say you had some doubt of it in your first answer?

A. I was not asked whether I had any doubt of 854
it.

Q. In whose handwriting is that name at the end, and whose name is it (handing witness a paper)? There is part of it rubbed off, you will see.

A. That has part of my name there; it looks like my handwriting. I would not swear to it.

Q. Do you see something that looks like your initials there at the end of that paper?

A. Yes, but I don't think I made that.

Q. Who wrote it?

A. I don't know. It don't look like mine very much. The R looks a little like it; the J looks something like it; the C don't look like it; the name 855
Cheatham at the end looks like my handwriting.

Q. Won't you give me an admission that that is your handwriting, that signature at the end, and the whole thing?

A. No, I would not swear to it.

Q. Will you deny it?

A. No, I won't deny it.

Q. You won't deny it? We will take that for an admission then.

Q. If you did anything out of the way in connection with this mill run did you do it of your own motion or by the direction of Mr. Sigafus?

A. I never did anything out of the way that I know of. I conducted everything according to

856 James R. Cheatham.

Colonel Egan's instructions as far as I thought he wanted me to go.

Q. Do you say that to the jury on your oath now?

A. Yes, sir.

Q. Everything according to Colonel Egan's instructions, did you?

A. Yes, sir.

Q. Do you say that to the jury on your oath now?

A. Yes, sir.

Q. Everything that you did there in connection with the mill run, you did in accordance with
857 Egan's instructions?

A. Not everything. I said everything that I thought he would approve of?

Q. How as to things that you thought he would not approve of.

A. I never did anything.

Q. Did not do anything of that nature?

A. No, sir.

Q. And that you will testify to now on your oath?

A. Yes, sir.

Q. Now I will read you this statement:

"Whatever I did when Mr. Egan examined the mine, I did under Mr. Sigafus's instructions, ex-
858 cepting a few which he did not say anything about. There was some ore in sacks in first level, in stope near second manway, north of main shaft; there was about fifteen sacks more or less. They were there when the mill run of Egan was started. I think I know who mined it, but would not say for certain. I think it was Kingsbury who mined it. I was told by Kingsbury that it was rich ore. I saw part of the ore myself. It looked like rich ore; it looked good. I only saw the top of the sacks. I should judge it would go $40 easy, and how much more I would not pretend to say. While the mill run was being made, I told Manuel Miller to put it into the chute, and while the mill run was being made I told some car man, I think Cocking, to

send it up so that it would go into the mill, and he did so, the car man, whoever it was. That was done for the purpose of getting the mill run. Sigafus told me to send it up into the mill and that was the reason why I did it. Now, that car man was supposed to keep a tally of his car loads on a board with a pencil. The pencil was hung on the board; the board hung there. The man at the hoist had a tally of the cars also, which he kept on a card. Boren, who was the car man in the second level, he had a tally which he kept on a board. He was sending up cars also. The other car man was on the first level. There may have been a few car loads of ore which were sent up during the mill test, which did not get on the tally boards, or which got on and were not reckoned. What I mean is, that if there was any mistake or discrepancy between the tally boards, the mine got the benefit of it every time, but I know that I did not deliberately take off from the tally boards any car loads that I was certain went up. The bulk of the ore that was sent up for the mill run from the second level was taken from the south of the main shaft and the bulk of the ore from the first level was sent up from north of the main shaft. The majority of the ore put into the mill during the mill test came from the richest parts of the mine. We got some ore from all over the mine, but the majority of the ore came from the richest parts of the mine, and the ore that was sent up was a good deal better than the average of the mine.

859 860 861

In sending up superior ore, I only followed his instructions; I mean the instructions of Sigafus. He told me to send up the best ore. Mr. Egan's instructions to me was to send up the average ore from all over the mine, but Mr. Sigafus's instructions were otherwise. The mill run was day times for about three days. I saw the amalgam after the

862 mill run. In my opinion it was very much richer than the ore we accounted for. In my own mind, I thought some one had put very rich ore or amalgam into it. I didn't put it in. Mr. Sigafus told me that he was very much afraid the mill run would not run high enough. He said that he wanted it to run thirty dollars. The second level north of the main shaft had been drifted further than it showed when Egan examined the mine. It was barren ground, and had been filled up and closed up so that it didn't show. Wilford was
863 working in a raise near it when I was there. The second level south of the main shaft had been drifted into before Egan examined the mine. There was nothing that amounted to anything there, and it was closed up. I was mine boss at the time Egan examined the mine. At the end of the mill run, Sigafus said, that he didn't clean up all the amalgam that there was in the mill, and said in substance, or used words that conveyed that impression that he was afraid it would show up too rich. I knew the mill run showed up higher than the ore would average.

I went to work on the Good Hope mine in July,
864 1890. They got out a good deal of ore in 1890 and piled it all up until they put in the Bryan mill in February, 1891. They did not mill any of it until the Bryan mill was put up. It was a good many hundred tons of good ore; about $8 ore. I will not undertake to say how many hundred tons. When the Bryan mill was put up, they milled this ore, and also ore they took out in 1892. "J. R. C."

The Bryan mill on soft ore would run a ton an hour, but, in my opinion, in 1891 and 1892, the mill, as run, did not average to run over 12 tons a day. Before Egan made his mill run, a mill run had been made by some one who was sent there by some one who talked of buying. I understood those fellows came here and wanted a mill run,

and we gave them one, but they didn't buy it. We gave them a very good mill run. Sigafus often told me that he had some very rich samples from the White Oaks. There were big gold nuggets in some of it he showed to me. While the mill test was being made there was nothing to prevent anyone from salting the mill run. The mill man did the firing and tended to the mill, and it was an easy thing for any one to salt the mill at any time, even if mill man was right there. The mill when grinding made so much noise that one wouldn't notice a person walking overhead in the crushing 866
room. Some time in 1892 and 1893 I left the Good Hope Mine for two or three months. When I came back, I noticed what I thought to be gold concentrates from the Good Hope Mine had, in my opinion, been squirted on the face of the vein. I know it was put there by artificial means, but I don't know who did, or why it was done. But I could guess. I scraped it off, some of it, and looked at it. I judged that it was gold concentrates. I had seen gold concentrates before, but never in an ore body. On the north side of the first level, close to the shaft, there was a big body of low grade ore, and there was lots of what I took
to be concentrates in it. An Englishman was 867
here and saw it some six months before, while I worked at the mine; there were a good many people who talked of buying it. Sigafus never had a surveyor in the mine while I was there. Mr. Jones read this over to me, and made the corrections which I suggested. It is all right, and I am ready to stand by this statement. It was made by me without any inducement in answer to his questions, the 18th day of April, 1895.

J. R. CHEATHAM."

Q. Now, Mr. Cheatham, you may make any explanation that you wish, any new one, about that

868 statement. Any inducement you had to make it, any inaccuracies that there may be in it, or anything that you would like to say to the jury.

A. I didn't make just such a statement; I think you have added a whole lot to it.

Q. What?

A. I think a whole lot has been added to it.

Q. Is that all you have to say?

A. That is one thing I will say.

Q. Say anything else?

A. And, furthermore, I don't think I would have
869 any occasion for making any such statement as some that you have got in there.

Q. Is that all?

A. I think that I was taken advantage of under the circumstances, to get a statement out of me, in the first place.

Q. How?

A. I say you took advantage. I was taken advantage of.

Q. In what way?

A. Because they owed me money, and if I had refused to have any talk with them at all they would simply have let me alone, like they left some of the
870 rest of their bills there. I am a poor man and I have got to pay my bills, and I had to protect myself.

Q. Do you mean to say that because somebody owed you some money you made a false statement?

A. No, I do not say I made a false statement, but I say that there are some things in there that have been put there.

Q. Been put there by whom?

A. I don't know who did it.

Q. There is your name at the end of it, you admit?

A. Yes, there is my name.

871

Q. Look at it now, and say what has been put on.

A. I don't know anything about where you put it. There is a whole lot of the statement, though, that is not true.

Q. That is another question. Who is it that you charge with putting anything there?

A. I don't charge anybody. Whoever has had charge of the paper all the time, I think.

Q. I must ask you to look at that paper over with great care and see if you can find a place where anything has been changed or inserted.

872

A. I could not tell whether it was changed or not. I don't recognize the paper.

Q. Did you write a letter to Doran last year?

A. Yes, sir.

Q. You knew that he gave a deposition for us, didn't you?

A. Yes, sir.

Q. And then you knew that he was recalled and further examined upon the other side?

A. Yes, sir.

Q. About the time they were going to examine him you wrote him a letter, didn't you?

A. Yes, sir.

873

Q. While it is being found, give us your recollection of what you said to him.

A. Mr. Doran made a proposition to me first.

Q. Now, what did you say to Doran?

A. I was going to lead you up to the letter.

Q. I wish you would answer my question. What did you say to Doran?

A. I don't know. If you will produce the letter I will show you what I said.

Q. Have you anything further you want to say about your statement? Say it all now; everything that you have, or forever after hold your peace.

A. I think they hadn't Egan up there for any-

874 James R. Cheatham.

thing in the world only to intimidate all the witnesses as well as myself.

Q. Were you intimidated?

A. I was kept from answering some questions that I dared not answer the way I should have answered.

Q. How about intimidation?

A. Well, just that much. Just as much as I have explained. Egan and I were interested in the same mine, and I didn't want to have any trouble.

Q. Is that the letter you wrote to Doran (hand-
875 ing witness a paper)?

A. Yes, I think it is.

Plaintiffs' counsel reads letter, afterwards offered in evidence, and marked Plaintiffs' Exhibit 29.

Q. What did you write that letter to Doran for?

A. Mr. Doran made the proposition to me that if he could get some kind of a settlement, that he would make a different statement in his deposition—in part of it.

Q. Make a different statement?

A. Yes; he would rectify something that he said
876 was wrong in it.

Q. And you knew that he had testified, under oath, at much length, about these transactions?

A. I was satisfied.

Q. You knew it, didn't you?

A. Well.

Q. And it was with reference to that—getting him to make a different statement—that you wrote that letter?

A. No. He simply made the proposition to me, that, if he could have a settlement with Mr. Sigafus——

I wrote to him because he asked me to.

Plaintiffs' counsel offers in evidence the letter from the witness above read, and it is marked "Plaintiffs' Exhibit 29."

Redirect-examination by Mr. Wetmore:

Q. What time of night was it when this statement that has been read was made?

A. It was about twelve o'clock at night, I guess. It was up in the big house on the hill, at the mine. Mr. Egan, Mr. Jones were present, and Mr. Wilson, part of the time.

Q. They were taking testimony in California 878
—depositions—in the matter of the foreclosure suit that summer, were they not?

A. Yes, sir.

Q. Were you ever supœnaed or asked to go on the witness stand and testify as to the facts in that statement by or on behalf of any of the parties?

A. I was supœnaed to go on the stand when they took depositions, and I refused to go on the stand.

Recross-examination by Mr. Stickney:

Q. Did you ever have a talk with Mr. Wilson after your refusal to go on the stand? 879

A. Mr. Wilson asked me to go on the stand, and I told him I guessed he didn't want my deposition.

Q. Did you say to him in substance that your testimony would be worth $700?

A. No, sir; I did not. I never said money to him at any time.

Q. You know that depositions were taken for Mr. Sigafus out there in this litigation?

A. Yes, sir.

Q. Did you get the witnesses or have anything to do with getting them?

A. Yes; I notified some of them.

Q. On whose employment did you do that?

A. Mr. McIntyre's.

880 James M. Sigafus.

JAMES M. SIGAFUS, sworn and examined as a witness for the defendant.

By Mr. Wetmore:

I am the defendant in this case. I live in New York. Before 1894 my home was in California. I had lived in New York about ten years previous to that, and then we went there and lived there three years. I resided in Tarrytown nine years, from 1882 to 1891. I became the owner of this
881 mine, or substantially the owner, in 1889, about August 1st. When I took possession of it the work on the south end down to the 250 foot level had been all mined and stoped and left in a dilapidated and dangerous condition, the same condition it was in when I left there.

This is a correct model (indicating model), made to a scale of 20 feet to the inch.

In developing the mine I started two shafts, one was that short one (indicating the north shaft), and that one (indicating the main shaft). This one (indicating the south shaft) they could not get down on, it was caved in. I sunk that shaft
882 (indicating the main shaft) to the 250-foot level, and the north shaft down 145 feet, in 1890. We started a drift for air and run a drift through the south level during that winter, the fore part of the winter of 1889–1890. We could not sink any deeper without getting air. The first level was started by days' work, running north and south about the same time. It was completed in 1893. I don't think we run over 100 feet in 1893. This lower level was driven out in 1893; it was driven year after year, in 1891, 1892 and 1893. And this lower level south was driven through in 1891. The first stoping was done on the north end of the lower level; that was all done in 1891, except what sloughed off. That was on the north end of the

883

lower level. There never was any mining done there; it was only cleaned out. The vein kept sloughing. It worked its way all the way from the level up to where it is now without any mining. In opening this mine, it was necessary that the first work done should be work that miners call "development." Development includes running the drifts, and opening the stopes so that you can put in any amount of miners that the ground will justify, so one will not be blocking up the gangway before the others, or the passageway or drift. It is absolutely necessary to have work on the levels pre- 884
cede the work of the stopes. Development work is done in order to open the mine so as to mine it at low expense, with economy, and to determine whether you have ore enough to justify building a mill, or to abandon it.

When I bought the mine there was a five stamp crushing mill there. I put up the Bryan mill, started it on the 6th of February, 1891; its capacity is about five or six tons for twelve hours.

Q. Was there anything unusual or peculiar in your method of developing that mine and opening it?

A. No, sir. 885

Q. In respect to good scientific mining, was that the proper course to pursue, the way that was opened up?

A. It could not be considered anything but properly done. There was no undue advantage taken there?

Q. In respect to the pay streak in this mine, how did it show?

A. The pay streak was continuous in the level except where the foot wall bent back from the hanging wall, making the gangue very wide. Then the drift would not cut it. We only run the drift the first time about three feet wide, just room for working. The gangue is the entire material between

886 the two walls. There is nowhere in the mine that I know, or that I ever saw, a formation of kidneys. It lies in large flat veins. It is not kidneys. There are three places in it where it is a little abnormal; a crack in the hanging wall and an indentation in the foot wall, and with an abnormal fill, and it pitches from north to south.

Q. Was that mine stoped out in any way prior to November, 1893, so as to show a continuous broad streak by taking out the narrow pinches?

A. No, sir; one half of that stoping was done by
887 the working of the mine without powder, drill or pick. The ground is loose. The gangue is all broken, and it is wet; and when it is first opened it is wetter, but it drains in time and keeps sloughing off, and the blasting in the mine and the barring causes a motion, and it gives way all the time, every day. We would have to clean those stopes up at least twice a week. The ore drops, and the waste, and all together, and it would in time accumulate several feet, all mixed up, with waste and ore that would be hard to separate, and it would leave the mine in a dirty condition. The gangue is broken, all crushed and broken, except where the
888 solid "horses" come in. Both of the wide places showed on the surface, and went from the surface as far down as I went. The vein showed all through that level (indicating the north level). Any man that knew his business ought to know to half an inch the extent of the pay streak as it was on the 17th of November.

Q. They are exposed all through?

A. All except 150 or 160 feet. It was stulled and lagged, as the miners drove it in 1892 and 1893.

Q. Was it possible to drive that drift through without stulling and lagging?

A. No, sir; you would be shut in if you went 15 feet. Behind there was the gangue. That drift was run through the gangue, along the hanging wall.

889

Q. Did you ever see Mr. Burnham?

A. Yes, sir. I know who he was. I never employed him in any manner or for any purpose. He first came to the mine by the request of Doran and Maxwell. Maxwell made the request of me. At that time they had no bond on the mine. They subsequently got a bond on the mine about eight months after. I was not at the mine when Mr. Burnham made his examination. I was in New York. I do not know who paid him for it. Lockhardt was the next one who made an examination of the mine. Burnham's examination 890
commenced, I think, the 7th or 8th of May, 1891. Lockhardt commenced the first of July, 1893. Mr. Griffith sent a letter of introduction by Lockhardt to allow him to examine the mine for him. Enderly, the next expert, did not represent anybody that I know of. The mine was examined by Mr. Walton in March, 1893, on behalf, as he said, of Richardson, of London. That was March, 1893. Lockhardt July, 1893, and Enderly July 25, 1893.

Q. Did any of these parties who examined the mine examine it at your request?

A. No, sir.

Q. And you did not pay any one?

A. No, I never paid a cent to anybody. 891

Q. You permitted people to come there under sufficient authorization to examine the mine if they wished to?

A. It was limited. I permitted these two, but there were dozens of applications that I would not permit, or did not. Burnham was there in February, I think, 1892, the only time I ever saw him at the mine. I saw him when he came up in May, 1891, and stayed over night. I left the next morning for New York. In February, 1892, he went through and measured the pay streak to see if it was any larger than he had made it in his former measurements; he so stated to me. I did not ask

him to come there. Doran and Maxwell had the bond on it at that time. Mr. Griffith's bond, which has been in evidence, was running in September, 1893, the extension. During that month I saw Griffith at Riverside on the 27th of September. When he left for Los Angeles he asked me to send him one of Maxwell's maps and reports. I mean by that such as they have here, what has been called the Burnham Report. He said he wanted the map particularly as Lockhardt had not made a map for him, and he was so technical in his terms that he
893 wanted to figure it out and have the exact measurements. I told him that was not the understanding with him, that he was to use anybody's report but his own, as he had not used even his name in telegraphing to me in regard to it—to keep it from outside, or from Maxwell. He said he only wanted it for a reference to gravel out these technical terms of Lockhardt's, and measurements.

Q. What time did he leave?

A. I think he went to Los Angeles that evening. I got home the next morning or the next day sometime. I told him that I knew Doran had one of Maxwell's reports, as he had, before he was married in February, borrowed one of Maxwell, and
894 had his wife copy it in shorthand and then made two copies for himself. He had sent one to San Francisco and must have the other one left, but whether he had a map or not I did not know. I asked him if he had a copy of Maxwell's report, and he said no, but his wife had the shorthand and she would write one, and she went and hunted up her notes, and in hunting the notes up they found a copy that he had not sent off, and he gave that to me, and I rolled it up as you would a newspaper and directed it to the Hollenbeck Hotel, Los Angeles. I mailed it on the night of the 29th of September. It would leave next morning at 8:40

895

and get in Los Angeles at 11:20. I never received any acknowledgment of that from Mr. Griffith.

Q. You have seen him write?

A. Yes, sir. This is the letter to which I refer (showing paper).

Defendant's counsel offers in evidence the letter referred to, from Mr. Griffith to Mr. Sigafus, and it is marked "Defendant's Exhibit E." There was no map with that report.

896

Q. In the document which you received from Doran and mailed was there any map attached to it, or with it, or photograph?

A. No, sir.

Q. Have you any recollection, one way or the other that will enable you to say, by looking at this, that it conforms to your recollection of that document (handing witness paper)?

A. That is not the cover that was on it. The interior may be it. It was a light cover. I did not read it.

897

By the Court:

Q. You say you did not read it?

A. No, sir.

Q. Do you mean to say you never read the Burnham report?

A. I read the original report.

Q. You assumed this to be a copy?

A. No, sir; that is not a copy of the original.

Q. This is not a copy?

A. No, sir. They made three or four batches——

The Court: Well, I don't want to interrupt.

898 James M. Sigafus.

By Mr. Wetmore:

Q. Mr. Bird is your son-in-law?

A. Yes, sir.

Q. Did you know of Mr. Bird having a copy of this Burnham report?

A. No.

Q. Did you ever see one in his possession?

A. Of that?

Q. Yes.

A. No.

First met Griffith in Los Angeles on the street
899 not far from Maxwell's office, about the first of May. He and Maxwell were standing on the corner, and Maxwell introduced him to me. I saw him next at the Hollenbeck Hotel between the 17th and 20th of May. Maxwell telegraphed me to Losgatos that when I came down to stope there, that Griffith was there, and he wanted me to meet him.

Q. When did you give them the bond?

A. On the 22d of May, when I came down—I think it was the 17th—Maxwell's bond had not run out; I think it expired about the 17th.

Q. Was the first bond to Griffith a bond to Griffith and Maxwell?

900 A. No, sir, to Griffith. They were side partners or silent partners.

Q. Did you have any communication with Griffith upon the subject prior to the 17th?

A. No, sir.

I was there when Lockhardt made his examination of the mine in July, 1893.

Q. Did Mr. Lockhardt make any reference to the Burnham report?

A. No, sir. In November, when Colonel Egan came there he did not make any reference to the Burnham report. He did not say he had come there for the purpose of verifying it. He did not ask me whether any statement contained in the Burnham

report was true, or show me any copy or make any reference to it. Colonel Egan arrived on the 16th of November, 1893, in the afternoon. Mr. Griffith arrived with him. Mr. Griffith introduced me to Mr. Egan as his expert, and told me to take him over the surface and explain to him the surface of the claim—of the mine. I went with him over the surface to the south. Went first to the working shaft. Then went down along the line of the lode to the old shaft, old No. 1, and there I explained to him that the dike that the vein laid on, bent sharp to the left and the vein cut the dike or went 902 through it. The dike is syenite or horn-blend rock and runs parallel with the vein for 1,900 feet back of it east; lays from fifteen to forty feet away from the main cropping of the lode. As it goes south they bear closer together, and as they pass back the vein cuts into the dike and turns to the left, the vein cuts sharp to the left and forms a pear-shaped hill or gore-shape, with the big end south and the little end up where it crosses there. Nigger heads or horn-blend rock appear above and are projections from the dike rock. I told him that was the south end of the mine. They had 1,900 feet north and that was all 903 the open ground north, but what was south was unexplored and the vein cut through it. It had been drove there 50 feet, but was very narrow where it came on the surface. I put the width of the dike between 300 and 400 feet, and at 500 there was an open shaft—a shaft on the open ground—sunk about 30 or 40 feet deep, and that was south of the dike. That was into the common rock; it was all the way in ore from the surface down—a good fair grade of ore. That was 500 feet south of the south shaft. The vein has passed through the dike and reunited there. I told him we had gone into the dike 150 feet and couldn't get any further for air, and to make an opening through it it would be nec-

904 essary to go on the other side and sink a shaft and drive back 150 feet, and I put it 300 feet or probably 400. I told him about this 150 feet, and that I could not run any further than that for want of air. We walked around the dike to the foot of the hill and back to the shaft again. It is a hill with a pear-shape with the big end south. He asked me if I had a working map, and I told him no, I never had a working map; that all he would find was two shafts and two drifts, and then he could measure and explore to his satisfaction.

905 Q. Did you make any sketch of that?

A. Yes, sir; on a piece of writing paper, I think it had the Good Hope heading on it—with a pencil. I was at the office.

Q. Did you put any figures on that?

A. No.

Q. In regard to the north end, did you make any statement before you went below as to the north end of the second level?

A. No, sir. When he came there to examine it I turned over the mine to him. I went down with him the first day, the 17th. I went through No. 1 north clear to the head.

906 Q. You came across this barren place?

A. We went in the stopes and down at the barren place; yes. Went through the stopes and passed this stulling and lagging up to the end of the level. There was a man working in the head there driving that stope ahead. During the time that Colonel Egan was there I never saw him more than twice a day. He spent his evenings down in the adobe house. He slept up in the parlor in my house. I saw him come frequently out of the mine at noon, when he was sampling, with his samples. He did not spend his evenings at my house. I gave him a key. I went to bed never later than half-past eight.

Q. During the time that he was there, did you

tell him that $57,000 had been taken out of the mine in any 12 months?

A. No, sir; I never told him there was any amount taken out at any time. Mr. Griffith asked me in regard to that and I gave him the figures that I had estimated on. I had a memorandum book, a little black one, in my pocket, and I gave him that—the tonnage—estimated tonnage that was milled July, August, September and October. The mill had been shut down from April to July. Then started up in July and had run from July until they were there. He never sent me back the book. 908
It was a correct estimate, as correctly as one could estimate it. The returns has in pencil the tonnage of each month's run, written in pencil, and I put it down at the same time. Those are the mint returns for July, August, September and October (papers shown witness). These are the original papers.

Q. See if you see on them the memorandum to which you refer.

A. On two of them I see it; I don't see it on the September. 300 tons on the August and September one, dated 28th; 160 tons on the July; there was 112 tons, I think, on the other.

The papers show July, being the return of August 4, $2,744.93, 160 tons. August and September, being the return of September 28, 300 tons, $4,872.36; October being the return of November 1, no memorandum as to tonnage, $1,355.56. These are not exact months, but as they came in from the returns. The average is about $15 per ton. Mr. Griffith saw those. Prior to this July I had taken out about thirty five or thirty-six hundred tons. There couldn't have been more than thirty-six to thirty-eight hundred tons, including these four months. Including the receipts and the next two months' run I got in all sixty odd thousand dollars. 909

I handed over the mine the first of January.

Q. Did you tell Colonel Egan that Burnham was

910 James M. Sigafus.

a smart, capable little fellow, or words to that effect?

A. I never heard Burnham's name mentioned.

I did not say that the figures, or any figures like those, appearing in the copy of the document that has been called the Burnham report, were correct, nor that the books relating to it were in the possession of my son-in-law Bird, nor that the sales of bullion carried out in the reports at $57,000 were correct, nor that that cost $15,000, nor any statement of that kind. I did not tell him that up to
911 the mill run of July, August, September and October of 1893, the average value had been $20 per ton of ore milled, nor make any such statement to him. I had milled but little before Bryan milled about 150 tons. I did not state to him or show him any statement that a run during the months of July, August, September and October showed that the bullion sold for $9,600, an average of $16.81 per ton.

Q. Did you tell Griffith that it amounted to $9,600?

A. We figured it up from them receipts. I showed him what the receipts show. I didn't average them; he did—between 15 and 16, he said.
912 He asked in regard to wages; I told him $2.50 for miners and $2 for laborers, the tram and surface men.

The last time I was in the second level south they were hoisting out of that winze with a windlass on a platform.

Q. When did you first hear of any boarding being there?

A. This last summer; I read it in Egan's report or in his deposition. I gave no directions as to having boards put up there. I do not know when it was done. I was at the north end frequently during the summer when they were making that upraise. There was a bank from the upraise that was started

under the winze on the top. I knew that heap was there. It was not put there for the purpose of concealing the fact that I had run off the vein. That upraise was through when Egan was there, and it was not when Lockhardt was there; otherwise the mine was in the same condition. I never at any time gave any directions that any part of the mine should be concealed or closed up.

The mill run began on the 17th, either an hour or two late in the afternoon, or early the 18th. It lasted until the 24th—about noon the 24th. It ran fully twelve hours a day. The revolutions were 914
reduced from 32 to 27.

Q. What, in your judgment, was the advantage of adjusting the revolutions of the battery to 27?

A. It did not throw the debris against the screens as heavily, and consequently there would not as much sulphurtes pass through.

Q. What was said between yourself and Col. Egan at the beginning of the mill run?

A. He wanted a mill run, and I asked him the amount, and he didn't know. He didn't state, and I asked him if he wanted 150 or 200 tons run, and he said no; only a little, about 20.

Q. Did he decide as to the unit he would take for 915
his mill run?

A. Yes; he agreed on three cars or skips to the ton, clean ore to be sorted in the mine. We was in the habit of sorting the coarse stuff out at the crusher. I saw the ore going into the mill part of the time. It was good ore.

Q. Did you, at any time during that mill run, place any gold or foreign substance or quartz, or anything of the kind, into the mill run?

A. No, sir.

Q. Mrs. Doran has stated that there was a pan of specimens of gold on the mantelpiece in her room. Did you ever know or hear of such a pan

916 of samples being on her mantelpiece or in her room?

A. No, sir.

Q. She mentioned about your saying that this was worth $75. Was there anything there worth $75?

A. There was gold bullion, about $75. That was in my wife's hand-satchel. I have got it still. There was a pan of small samples in my apartments on the mantelpiece. I have them here. There were lots of specimens in the office; the large
917 ones was lying around on the floor, and the smaller ones, the choice ones, was in a cabinet. It was a little frame cabinet, with a glass door in front of it that slid up and down; I think there were six or seven shelves on it. They were labelled with the mines they came from. I left them there. I saw them last when I left the mine in 1894, January.

Q. Did you, any day of the mill run, come across from the garden and stop and take some quartz out of your pocket and look at it in the sun?

A. No, sir; nor no other day.

Q. Suppose you had those two pieces of quartz and put them into the mill run, how much would
918 it have added to it?

A. Well, you could hardly figure it; it would be a millegram, maybe.

Q. What are those (showing)?

A. That is the sulphurets that they said were put in the mill. That is fine gold that I got in 1878. I bought it of a Jew. These were all in that identical package. There is all the specimens (referring to specimens).

Q. What are these specimens, Mr. Sigafus?

A. They are the Good Hope, and that is as large as I ever saw in the rich one you could see any gold in. Those are the very choice ones, from the Good Hope Mine. There is the $75 that was spoken of (showing). My wife got that in 1878. That is in

the same bag. Here is another one (showing). That is a gold retort that I made here in Tarrytown in 1890. 919

Q. Now, Mrs. Doran has stated that a conversation took place between yourself and Mrs. Sigafus in the room below hers, one night as you were retiring, in which, in substance, you told Mrs. Sigafus that you were afraid that the mill run would not stand up to the assays, or words to that effect?

A. No, sir; I never had any such conversation.

Q. Did you ever have any such conversation?

A. No, sir.

Q. From the beginning to the end of that mill run, to the best of your knowledge, was there anything about it to give it a fictitious character of any kind whatsoever? 920

A. None whatsoever.

Q. Taking the tonnage avordupois, how did the result of that mill run compare with the yield of the mine before that?

A. It didn't run over the whole amount that had been run through from the time the mill was started—the average of the whole amount.

By the Court:

921

Q. Then the average value per ton was the result of the mill run, and no larger?

A. During the whole operation, sir.

The Court: I thought it was shown that this average was $30.

Mr. Wetmore: No; it is $36 for three carloads.

The Witness: Col. Egan gave me a duplicate of his samples, as all other experts that had gone there had.

Q. How did your assay compare with that of Col. Egan's.

922 A. Identical. If he would have separated his rich specimens they would have been of the same result; but he had one in that he called in his assay.

By Mr. Stickney:

Q. Striking those out, yours and his were the same?

A. And the result of them, too, were the same. My assay and Egan's agreed, as we figured them.

923 *By Mr. Wetmore:*

Q. Now, during the time that Egan was there, did he have a key to the office?

A. Yes, sir; I gave him the key.

Q. Did you have a key to the office in your possession during the time that Egan was there?

A. No, sir.

Q. Was there any other key to the office besides the one that Egan had in the camp while he was there?

A. There had been two keys. Doran had one and gave me the other. He put the Yale lock on
924 himself when he was sleeping there.

Q. Do you know whether Doran did or did not have a key while Egan was there?

A. I have never seen it.

Q. That was the only other key—Doran's—of which you had any knowledge?

A. There was only two, as far as I know, to that Yale lock.

Q. During the time Egan was there did you have a key yourself?

A. No, sir.

Q. During the time that Egan was there did you, either by means of a key, or in any other way, get access to the office?

925

A. I went in once with Egan and Cheatham. I was in twice. I was in on the 18th, when they came up out of the mine and took him in and got my overcoat to go to Perris; it was storming. The other occasion was, he asked me to come up and see his method of drying. Griffith was drying the samples, while he was sampling the mine, on a piece of sheet-iron on the chimney about a foot above the fireplace, and built a coal fire under it; and I went with him and Cheatham about noon when they deposited their samples with Griffith. Griffith, Egan, Cheatham and myself were present. I was there for five or ten minutes.

926

Q. Now, either on these two occasions of your visit, or on any other occasion, or in any other manner, did you get access to that office, and tamper with, or alter or substitute, or do anything whatever to Egan's samples?

A. No, sir; never was at the office any other time until the day we left.

Q. What did Egan keep his samples in?

A. I don't know; he put them in a sack in the mine.

Q. What, according to your best recollection or knowledge, in the amount of mining that you did, did the ore average per ton in returns?

927

A. About $15; some of it wouldn't run anything. There was places where it would not assay anything, and it would assay, maybe, $30.

Q. Between what limits did that ore run—I mean, what was the poorest and what was the richest while you were there?

A. If the mill ran the same average number of hours, it would not vary 25 or 26 full days that we ran. It would not vary but very little. We did not run Sundays.

Q. What was the highest assay that you remember?

A. That sample Egan took out was the highest I

928 ever assayed—eight hundred and over. There were rich and poor openings all through, but if you took ore from all parts of the mine, the average would be about the same.

Q. Did you, in doing your stoping work—how did you work as between the two walls—did you cut from the hanging wall to the foot wall?

A. Yes; where there was not an exceptional hard horse. The foot wall and hanging wall, on the average, was about six or seven feet apart. I don't know of its being closer than two or three feet. I
929 broke in the stopes from wall to wall. The average width of the pay streak was about 18 inches.

By Mr. Johnson:

Q. What was the size of the main shaft, so far as you sunk it?

A. 4x7 for the first 250 feet down. It was over the vein. They cut the hanging wall. The first level south was three feet wide and six feet in the clear in height. It was driven on the hanging wall. The second level from the main shaft to the south shaft was three feet wide and six feet high, drove
930 on the hanging wall. The first level north, six feet in the clear and three feet wide. It was driven on the hanging wall, principally.

Q. How wide and high was the second level north?

A. The same—six by three. These levels did not cut the entire vein between the foot and hanging wall where they went. The cutting on the top of the first level north at the extreme north end was about three or four feet above the back of the drift for about 150 feet. The distance between the stopes just north of the shaft on each level was 50 feet. Between the end of the stope on the first level north and the end of this cutting place in the first level north was from 120 to 150 feet. Between the stopes

on the second level north it was in hard ground for about 100 feet. These stopes above the first level north, at the time Egan was there, wouldn't average 20 in height from the bottom of the level; about 14 feet from the top of the level. The stopes above the levels south averaged about 18 or 20 feet from the bottom of the level. They were not quite 20 feet high over the second level north until you got out near the up-raise.

The space not stoped on the first level south was 40 or 50 feet long. I never was in the old workings but once. They were substantially worked out 932
when I got there. I might have taken out 200 or 300 tons of ore from the first 250 feet of the shaft; not more, because they followed down on the hanging wall, and no pay in it. Out of the rest of the shaft, when it was sunk, I took about five or six tons between the levels. I did not get more, because that was all they saved. It was done by contract; they threw the ore in the dump. The up-raises between the first and second levels, when Egan was there, were about six feet by three—six feet on the vein by three or four feet across it. The winze, when Egan was there, was about forty feet. I never was in it after it was sunk. Out of this 933
south shaft there might have been taken out ore and waste that was milled, ten tons. I up-raised the south shaft from the level to the other—all of it but about two or three feet between the levels. I did not raise any of it from the first level to the surface.

By Mr. Wetmore:

Q. About these sacks of ore—did you give any directions to Mr. Cheatham about sacks?

A. I didn't know they were there.

Q. Do you know anything about those sacks containing ore of peculiar richness?

A. No, sir.

934 Q. Do you know how they happened to be there?

A. No, sir. During July and August they sent us three or four car loads of sacks from some place, I don't know where. I was there when they sent them through the crusher. They were only ordinary ore. It was sacked because they had stoped back and could not get it out without throwing it over and over several times, and they sacked it and carried it out.

By the Court:

935 Q. How many sacks would it take for a car?

A. 25 or 30. There is now, if they haven't taken them out since I left there, there is 75 sacks in the stopes that was in there in 1890.

By Mr. Wetmore:

Q. There are sacks still there that was there and left there since when?

A. 1890, being in the south end, 1889, before I bought the mine. That was not particularly rich. They had to sack it to get it out. They used to sack it all that came out of there before I came there.

936 The barren streaks run about the same as the ore shoots coming down from the north to the south; that one on the top there would cut down to the other, although it might be ore—pay ore—in places between, but the foot wall has a bunchy or ribby appearance.

Q. Now, are the symptoms of that barren streak visible in the mine?

A. Any place you drive through it. When we went through the first level it was visible to any body examining it, you could see it in the whole face of the drift.

Q. Where else was there barren ground?

A. On the lower level there is hard ground down

there, and it was open above the upper level and rotten.

Q. That was where the wet ground was?

A. Yes.

Q. And how about that being visible?

A. You couldn't see it for the lagging.

Q. I mean the lower part of the lower slope.

A. There wasn't anything in there only a few spiles where there was loose places, to keep it from dropping.

Cross-examination by Mr. Stickney: 938

I bought this mine about 1889 from R. M. Moore. Mr. Bird didn't have any interest in it; no money interest in it. He owned the annex. He didn't hold any of the stock.

Q. Did you hold a large portion of it in your own name, of the stock?

A. I held it all till I got ready to transfer it. I bought the mine and paid for it. I sold the mine to Mr. Griffith. He did not act as my agent in any way in negotiating the sale.

Q. At any time?

A. No, sir.

Q. I show you Plaintiff's Exhibit No. 22, dated 5th July, 1893, which purports to have your name at the end of it. In whose handwriting was that name, James M. Sigafus? 939

A. Mine. The next name below it is J. Everett Bird, my son-in-law, in my handwriting. The next name is Griffiths, in his own handwriting.

That is the contract of the 5th of July, by which I agreed to sell the property for $232,000. The parties of the first part who agreed to sell are James M. Sigafus and J. Everett Bird. I signed both names to that paper myself; the annex was included in that contract.

Q. Now, I show you this paper which has not

940 been put in evidence, dated the 5th of July, 1893. What is the first name at the end of that?

A. The first name is my own; then J. Everett Bird, signed by me, and W. H. Griffith, that is his signature. And at the end is W. H. Griffith, agent; agent for his Denver parties, Dave Moffat and Woodbury of Denver. Griffith was acting as agent for them then in this transaction. He signed his name, I guess, to every document as agent for somebody.

941 Paper offered in evidence and marked Plaintiff's Exhibit 30.

Q. Now, I will show you Plaintiff's Exhibit 23, which has been called the agreement of extension, extending the paper of July, and in whose handwriting is the name "James M. Sigafus," at the end of it?

A. Mine.

Q. Let me call your attention to this clause: "It is further stipulated and agreed that said Griffith shall go immediately to New Orleans and endeavor, as agent for said Sigafus, to sell said property for the sum of $350,000 to the parties represented by Enderly, of New Orleans, or such other
942 price as said Sigafus may authorize said Griffiths to accept." Would you like to look at that (showing witness the paper)?

A. I know about this.

Q. So you never knew or understood that Mr. Griffith was to act as your agent in regard to the sale of this property at any time?

A. No, he was not. This was my own sale to Enderly. That is the one that Enderly offered me $350,000 for the mine, and made the examination the 24th of July or the 25th, and I met Griffith at San Bernardino on the 24th; he was on his way East, and I was going to New Orleans myself, and he said he would go to New Orleans, and, if En-

derly did not take it at $350,000,—he was to have 10 per cent. if Enderly took it at that price. 943

Q. Do you say those words about Mr. Griffith acting as agent "for said Sigafus" were not in the contract that you signed?

The Court: He says they were not in the original contract.

A. I did not understand that that covered anything of the original. At that time it was only his going to New Orleans to take up this offer that Enderly had made. I gave him all the letters and 944 offers that Enderly sent to me, everything with that instruction.

Q. How long had you been trying to sell this mine?

A. I never tried to sell it. Griffith was the first man I ever negotiated with, or attempted to. Maxwell had been trying since the spring of 1891.

Q. Had any other parties been trying to sell it?

A. No.

Q. But you did not have anything to do with these efforts to sell it, did you?

A. No, sir; I never negotiated with anybody but Griffith. 945

Q. Why do you put in the words that you never negotiated with anybody? Was that what I asked you? I say you never had been trying to sell this mine; you had had nothing to do with these efforts to sell the mine, had you?

A. No, sir.

Q. In any way or shape?

A. I had the mine, and if a man came there and said that he wanted to look at the mine to buy it, of course I would not kick him out.

Q. You would not absolutely kick him out, and that is about all, isn't it?

A. It was for sale.

946 James M. Sigafus.

Q. Had you anything to do with preparing the mine for sale?

A. I had all to do with developing the mine, like any other mine owner.

Q. You had all to do with developing it as it was developed?

A. Yes.

Q. Now answer the question if you please; had you anything to do with preparing the mine for sale?

A. I don't understand what you mean by that.

947 Q. You do not?

A. No. If developing a mine is preparing it, then I had—if that is what you mean.

Q. Is there such a thing as rigging a mine for sale?

A. I never knew one where you did not have a rigged expert to make it to his liking.

Q. Is there such a thing as rigging a mine for sale?

A. Not to my knowledge.

Q. You don't know anything about how it is done if there is such a thing, do you?

A. I never did it.

948 Q. And you don't know at all how it is done, do you?

A. No, sir.

Q. And you never gave any directions in any way or shape for anything of that sort?

A. What do you mean by way or shape? Do you mean not rob the mine?

Q. Oh, no. Did you ever give any directions in any form as to preparing this mine for examination?

A. I gave directions always to keep that mine in a first-class condition.

Q. And that is all?

A. That is all, yes; first-class condition.

I gave directions always to keep that mine in a

first-class condition. There were barren places in this mine, and in all mines that I have ever seen.

Fifty feet is as far as I developed any one barren place. That was on the second level north—the first and second level north. There was not any barren space developed south of that level.

Q. Did you at any time give any directions that the excavation should go on until they struck rich parts of the ore, and then that they should stop?

A. No.

Q. Nothing of that sort?

A. No, sir.

950

Q. Did you ever give any directions about timbering where they had struck barren places?

A. No, sir; any more than I gave directions generally in the mine to timber all places that were dangerous.

Q. And that was all?

A. And wherever they commenced stoping it had to be timbered, solid or not solid.

Q. Then your directions for timbering were strictly limited to places where the danger to the miners made that necessary in the ordinary course of the mine?

A. Not necessarily; no. The instruction was to keep the mine in first-class condition, and to do so 951 it must be timbered.

Q. And those were the only directions that you gave?

A. Well, "only"—I never gave any special directions to cover up anything.

Q. Have you ever seen that (handing witness a paper)?

A. Yes, sir.

Q. What is it?

A. It is a letter to James B. Doran, May 7th, 1891. I wrote it.

Q. Is it all in your handwriting?

A. Yes sir.

952 James M. Sigafus.

The letter is offered in evidence, and marked Plaintiffs' Exhibit 31.

The Court; What letter is that—one that has been read?

Mr. Stickney: No; it is a letter to Doran of May 7, 1891.

The Court; Are you going to read it?

Mr. Stickney; Yes, sir (reading).

"May 7th, 1891.

"JAMES B. DORAN, Esq.,

953 "*Dear Sir:*

"I have not heard from you for several days, but hope to on Monday, and hope to have good news both as regards the mine and the parties from 'Frisco."

Q. Where was this written?

A. I don't know.

Q. Just look at the heading and state where you were when that was written. Where were you in May, 1891?

By the Court:

Q. Doran was at the mine then, wasn't he?

954 A. Yes, sir.

By Mr. Stickney:

Q. Then when you wrote this you were not at the mine?

A. No, sir.

Q. Where were you?

A. I don't know whether I was in Mexico or New York.

Q. One or the other?

A. Yes, sir.

Q. This is your regular paper with your printed heading?

A. Yes, sir.

955

Q. So when you wrote that, you were either in lower California or in New York?

A. No, in Mexico.

Q. "In your last letter you spoke of both the North No. 2 drift having good ore and also the upraises. Now, if the 75 foot stope is as good as you say it is, it is best to let it stand, for three feet of good ore in a stope is a good thing to let stand for measurement when the mine is measured." What did you mean by that?

A. It is a very good thing.

956

Q. "Put the stopes in good shape and leave them and start another ore drift on No. 1. The 150 stope should be driven up until it got into good ore and then left, and the 225 foot one and so on." What did you mean him to understand by that?

A. Read that again.

Q. "Put the stopes in good shape and leave them and start another ore drift north on No. 1, the 150 stope should be driven until it got into good ore and then left, and the 225 foot one, and so on." Do you want to explain that?

A. To open the drifts in good shape and leave them.

957

Q. "There is good ore in all of them at some points, and when we have found it it is best to leave it stand so as to put the mine in the best possible shape to be examined by anyone." So you never gave him any directions to put the mine in shape to be examined, did you?

A. First-class condition.

Q. You never gave him any directions to have the mine put in shape for examination, did you?

A. I should not want to leave it as these people have.

Q. Are you willing to answer the question? If you are not, I will pass on. Is it a difficult question to answer?

A. I have answered it, have I not?

958 James M. Sigafus.

Q. I thought not. Do you think so?

A. My instructions were to keep it in first class condition.

Q. Those are the only instructions you ever gave, aren't they?

A. I don't remember all the instructions that I have ever given.

Q. No, you cannot remember them, but you do remember that that was the only instruction that you ever gave?

A. Yes.

959 Q. "It can be in no better shape to than it is when all the stopes is in good ore. The poor places will count for nothing either to work or to sell, so they may as well be closed up for good, as they are of no value whatever." You never gave any directions or suggestions that the poor places should be closed up, did you?

A. There isn't any closed up.

Q. There never were any poor places closed up, were there?

A. No.

Q. And you never gave any suggestions or directions that they should be, did you?

960 A. Well, I don't know what you call that.

Q. What do you call it? Is that a hard question to answer? I will go on. "Now, if these men don't take hold of it then I will. As soon as it is in tip-top shape have parties examine it again." What did you mean by tip-top shape?

A. Develop the stopes.

By the Court:

Q. Who did you refer to by "these men"?

A. I don't know. Maxwell was making this examination.

By Mr. Stickney:

Q. You think that was Maxwell then that was examining?

A. Yes, nobody else.

Q. Nobody else had?

A. Yes.

Q. Some other people examined it at different times, didn't they?

A. Enderly and Luckhardt.

Q. Who else?

A. Walton.

Q. Now, I will read further: "I want to push 962
north as fast as we can on both drifts, and put the mine in the best possible shape, and when you have good ore from two to three feet thick in the stopes, leave it stand for it will bring ten times more to sell in that shape than after it has gone through the mill." Was that your opinion then?

A. It seems so.

Q. "All I want of the mill is to keep up the expenses of the mine for another year or so, then the mine will be in good shape to sell for a good price." That was your opinion at the time, was it?

A. It was what I hoped for.

Q. Do you think you succeeded? 963

A. No, I did not. I did not get a price for it.

Q. Now, I call your attention to this. "Whatever it is you or I would sink on it if we found it in any place in the country——"

The Court: What is that?

Mr. Stickney: I will begin further back.

Q. "At least the ore now will pay for all the work done on it for ten feet deep and may be a good pocket of ore. Whatever it is you or I would sink on it if we found it in any place in the country; so I think as there will be no rain again for some time,

964 it will be well to go down a little on it, and then if it plays out, we can fill it up again"?

A. What is that in—the surface?

Q. I don't know. That is for you to say. What do you mean? What did you mean when you wrote that.

A. I don't know what you are talking about.

Q. You don't know what I am talking about?

A. No.

Q. I am talking about what you wrote in this letter. Do you understand now?

965 A. It might have referred to anything.

Q. Is that the best answer you can make?

A. Yes, sir.

Q. You don't wish to improve on it, I will go on. "This ore is good, what there is of it, and if there is plenty, that is all we want. A few days will tell what there is in it, so if these parties from 'Frisco don't take the mine then it must be doubled in its measurement before experted again." How were you going to double it in its measurements?

A. Run it out 1,000 feet further.

Q. In the same way that you had already run what you had run?

966 A. Yes, sir.

Q. And that would double the measurement, wouldn't it?

A. Assuredly.

Q. "Now, we know about how much it will measure, and can tell about how much more to get in order to sell at a certain figure." What are those words at the end just before the signature?

A. "Kill the snakes." I wrote him to kill the rattle snakes there.

Q. I show you the letter of November 7th, 1890, to James B. Doran; is that yours?

A. That is my handwriting.

Q. It is in your handwriting, the whole of it?

A. Yes, sir.

967

Q. I call your attention to these clauses: "The value of ore has not been determined, as it has not been milled since the present owner worked it." Who was the present owner?

A. What date?

The Court: The present owner is Sigafus. Don't spend time.

Q. "The old north shaft has turned out lots of gold. There is no way of telling anything near the amount turned out. Now, in talking with them, if they mean business, you can say that I don't want to sell, but that it might be got 968 provided that a fair value was offered." You did not want to sell the mine, did you?

A. I would sell.

Q. You might have been induced?

A. I might have been induced.

Q. "By the way, I have nearly sold the North Homestake mine. The parties will let me know next week. If they don't take it then, an English party will take hold of it. The same party wants to examine the Good Hope also, with the intention of buying. I can sell it if it shows up as well as it did when I was there, as development goes on. I want to get in the ore in north shaft No. 2, that 969 you sunk last fall. There is a fine body, of course, in that shaft. I will let you work these men, and will help all I can when the time comes to make the sale." How did you propose to help when the time came to make the sale?

A. I don't understand what you mean.

Q. What did you mean? The point is not what I mean, but what you mean. What did you mean?

A. Read that again.

Q. "I will let you work these men and will help all I can when the time comes to make the sale." How did you intend to help when the time came to make the sale?

970 James M. Sigafus.

A. How would a man sell a piece of property without being interested in it?

Q. I agree to that. How did you propose to help when the time came to make the sale?

A. I don't know.

Q. Who does know, if you do not?

A. Well, I can't tell you how.

Q. It would not be by tampering with the ore that went into the mill, would it?

A. No.

Q. You would not do anything like that?

971 A. No; I would not to save your life and mine.

Q. What is that (showing witness a paper)? Does it look like your handwriting.

A. Yes, sir.

Plaintiff's counsel offers in evidence the letter shown to the witnesss, dated November 21, 1890. Marked Plaintiff's Exhibit 32.

Q. I will call your attention to this: "Now whether these men want to buy or not, what I want is to have a good report go out from the mine, and if you will be careful and show the best and give him nothing but good samples, it may go a good ways towards bringing the property before
972 the public." Do you remember that clause?

A. Yes, sir.

Q. That was your opinion, was it not?

A. Yes, sir.

Q. Now I call your attention to this clause: "Remember that he is not to expert it, but only go through and see what we have done and are doing, and can have all the samples he wishes to take away. You select them." That was your direction to Mr. Doran, wasn't it?

A. Who are you talking about now? Who was this?

Q. I don't know. Do you?

A. No, sir.

Q. Without reference to who the individual was, that was your direction to Mr. Doran, was it not?

A. I would not let any man go and expert the mine.

Q. That was your direction to Mr. Doran, that he should select the samples?

A. See them selected.

Q. Did you suppose he was going to select the poorest ones or the best ones?

A. He would not select the poorest or the best. He should select a fair sample.

Q. " Don't make a mistake, but know where the ore is fair, and let him get an average lot of samples only, and be sure and show him the croppings close to the coal bin, both of them, the one that Walter cut in digging out the bin, and the one further west. The one furthest west is No. 1. It is small, but rich. You remember seeing me pan some of it. Be sure and call his attention to this, and also that it goes down 300 feet from the shaft, and he also can take samples from both the top and bottom. In this case tell him that the shaft is over and the vein for 200 feet, which you can show him. I don't think that I would take in North No. 2 this time, as the drift is not in ore, or has not been." You remember that fact, do you? 974 975

A. Yes, sir.

Q. That was the fact, was it not?

A. That was in 1890. The drift then was in only about 250 feet; it was on the hanging wall.

Q. " I think we are off of the vein, and when we find it then it is time to examine it." It would be a good time, wouldn't it, to have examined it when you are on the vein again?

A. Pretty good.

Q. " You may also take him in the south shaft, if you should think it best to, but there is nothing there to show; it might not interest him much. And then, if they wish to make an examination of the mine,

976 they will have to wait until I come out, as it is not in any shape to be examined." That was the condition at that time, was it not?

A. Let me say here——

Q. Just give us an answer first, and then you can explain afterwards.

A. The first 600 feet, the contracts were not completed then. One of them was in 120 feet on the lower level, and the other was in about 200 feet on the other level, and the upper level south was driven through in July, and the lower level was in
977 about 150 or 160 feet. It certainly was not in a shape to be examined by anybody.

Q. Why not?

A. They were driving the drifts by contract.

Q. That is all the reason?

A. They were not in any distance. There was no ground to measure.

Q. There was ground to measure, wasn't there? You can always measure ground. Perhaps you mean that there was not any ore exposed to measure, is that it?

A. No; there was not ground enough to estimate anything. You could not sell a mine on that much
978 ground, without it was fabulously rich.

Q. Let me ask you as to the Burnham report. You did not know anything about the Burnham report, did you?

A. Yes, sir; I did. Burnham sent me the original report and I have got it right now. He sent it to me in Tarrytown on the 25th May, 1891. I was in Tarrytown. He sent it to me because that was the contract when I let him in, I would not let him in unless he left one-half of the samples in the office, marked from the places they came from and sent me a report or a copy of the original report. That was the condition that he examined the mine on, an exact duplicate of the original report. I never had the original report.

Q. What did you say a moment ago—didn't you say you had the original here right now?

A. No, that is not what I meant.

By the Court:

Q. What did you mean?

A. He was to send me a true copy of the report and one-half of the samples were to be left in the Assay Office, marked from the place they came from, in a little sample bag about three inches by four; after he had cut them down and divided them he was to leave me one-half. They were there when Mr. Egan made his examination, every one of them; he could have verified any one of all those samples. 980

By Mr. Stickney:

Q. I ask you to produce the paper you got from Burnham.

The Court: Does it differ from what we have been considering, Mr. Wetmore?

Mr. Wetmore: Yes, sir; this is evidently the first report that is referred to in the copy that has been put in evidence. You will remember that in the copy of the report in evidence he refers to a first report. I take it that this is it. 981

By Mr. Stickney:

Q. You have heard a great deal said by your counsel, in their questions and otherwise, about the Burnham report not being signed?

A. Yes, sir.

Q. Is there any signature to that? (Showing witness Burnham's report just mentioned.)

A. No.

982 Q. When was that made or when did you get it?

A. I got it on the 25th of May, 1891, and it was made between the 6th and 25th of May, 1891. Mr. Burnham only examined the mine once for that report.

By the Court:

Q. Did he examine the mine again and make another report?

A. No, he went through and made some measurements, and he made it a quarter of an inch
983 bigger than that. About nine months afterwards he was in measuring the mine and examining it.

Q. Then he did come there and he went through the mine with you again?

A. He came there and went through the mine and made measurements every ten or twelve feet.

Q. When did he come the next time?

A. It was about February, 1892. This was the second time.

Q. Did he come alone?

A. He was there about two days alone.

Q. And he made a further examination?

A. He made further measurements. He did not
984 make any assays; he made no tests of the ore, none whatever, without it was a pan, as all of them do—pound the ore in a mortar and pan it.

Plaintiff's counsel offers in evidence the copy Burnham report referred to, and it is marked Plaintiff's Exhibit 33.

By Mr. Stickney:

Q. How many reports did he make?

A. I don't know.

Q. You said a little while ago that he only made one.

A. The others were the Maxwell reports. Max-

well made them whenever he had time. Maxwell kept making them at Los Angeles, and distributing them all over the country.

Q. What do you mean by that? Do you mean that Maxwell kept making new editions of the Burnham report?

A. Yes, sir.

By the Court:

Q. Did Burnham make a further report in 1892?

A. Not that I know of. 986

By Mr. Stickney:

Q. What was the date of the one that he made in 1891?

A. He made the examination and report between the 6th of May and the 25th.

Q. 1891?

A. 1891.

Q. And that is the only report that he made that you know anything about?

A. That is the only report that he ever sent me.

Q. You remember that the copy of the Burnham report, so called, that we have produced here upon 987 this trial as the one that came through Mr. Griffith, do you?

A. Yes, sir.

Q. And it came to Mr. Griffith from you? You admit that?

A. I don't think I ever saw that report, that identical one.

Q. You do not think you have ever seen that identical one? Mr. Griffith's testimony that it came from you, you remember, do you not?

A. Yes, sir.

Q. Do you intend to deny that?

A. I don't recognize the report. I don't deny it.

988 James M. Sigafus.

The cover here is a dark color and that was a soft paper cover.

Q. Have you taken interest enough in this litigation to read through what is called the Burnham report?

A. Yes, I read it through last fall first, in Boston.

Q. It was produced on Doran's examination in California, was it not?

A. Yes, sir.

Q. And a copy was annexed to the deposition?

A. Yes, sir.

989 Q. Did that differ at all from the one you examined last fall?

A. That is the one.

Q. So that you knew last fall that the copy of the so-called Burnham report that we produced here was in its present form?

A. As far as I know, yes.

Q. And you have never denied, unless you are doing it now, that that came from you to Griffith, have you?

A. I don't know that I ever did or did not. I sent one to Los Angeles to Griffith.

Q. If you don't know whether it did or not, you will not deny it under oath, will you?

990 A. I won't say whether it is or not, but I don't recognize that hard cover. My recollection is that it was soft and light colored.

Q. You are quite well aware, are you not, that the Burnham report which we produced, which was identified by Doran way back in April, 1895, purports to set out the product of your mine from January, 1891, to and including February, 1892? You know that, don't you?

A. No, sir. It includes away back of that—1890.

Q. I did not ask you that. It does have a statement in it, has it not, of the product of your mine from January, 1891, to and including February, 1892?

991

A. It has a statement, but it is not correct.

Q. Never mind about that. It has a statement. And you say that the last examination that Mr. Burnham made was in the spring or early part of 1891?

A. He made a measurement then, yes.

Q. And he made that report at least prior to 1891, didn't he?

A. I don't know.

Q. Can you explain to the jury how it happens to be that a report made in 1891, early in the year, contained a statement as to the output of your mine down to February, 1892?

992

A. It did not.

Q. How did it get there, then?

A. It is there like lots of those other statements, that $317,000, that nobody ever heard of only you—or the man that put them there.

Q. To your best knowledge, information and belief, who is responsible for those statements?

A. I don't know.

Q. Did the figures as to that output come in any way from you or from Mr. Bird?

A. They never came from me, nor from Mr. Bird, that I know of. There were no regular books kept of the mine. All the books that I had was the 993
check-book and the time-book, and there was a stock-book; and I turned them over to the company. The other books were there. They had the whole of them.

Q. Was there any account kept, showing the output or product of the mine?

A. I don't think there was. I have never seen it.

Q. Have you ever seen any statement in writing of the product of your mine?

A. No, sir.

Q. Did Bird keep any?

A. No; I think not. He might have kept them,

994 but not continuous. He might have put them down in his memorandum book. I have never seen any.

Plaintiff's Exhibit 33 is produced.

That paper was sent to me by mail to Tarrytown. It was mailed at Perris. I think it was mailed by Mr. Bird, my son-in-law, who kept my books and papers, such as they were.

Q. That has two or three photographs in it, you notice?

995 A. One.

Q. Who took it?

A. I couldn't tell you.

Q. Have you no idea?

A. No.

Q. Did Mr. Bird take any photographs of it?

A. I don't think he did up to that time.

Q. You know that he did at some time?

A. Yes, sir.

Q. And he had a camera out there, didn't he, at the time?

A. Yes, sir.

Q. And he took a good many photographs first and last at the mine?

996 A. Yes, sir.

Q. Of the mining property?

A. Yes, sir.

Q. Who took that one?

A. I think that Burnham's brother did.

Q. Was he also a photographer?

A. I think they had a kodak there. I think Bird never had one prior to that.

Q. And you remember now that Burnham's brother was a photographer, and that he took some photographs?

A. I think I understood that he was the man that took them.

Q. How did you understand it; from whom?

A. I have frequently heard it since.

Q. Who have you heard say so?

A. I think Burnham came there and took some himself.

Q. Who have you heard say so?

A. I heard Burnham say so.

Q. Is that all that you know about it?

A. Yes, sir.

Q. That you heard Burnham say that he had a brother who took photographs?

A. His brother was with him at the examination.

998

Q. Now, there is one, isn't there, there (indicating)?

A. Yes, sir.

Q. Now, I show you the copy of this Burnham report, which has been previously identified as the one received by Mr. Griffith from you. You will notice there is an entire sheet in that one containing the alleged returns of gold bullion from the United States Assay Office to the Good Hope Consolidated Gold Mines. You notice that sheet, do you?

A. Yes, sir.

Q. That is a separate sheet. Is there any such sheet in that one?

999

A. No, sir.

Q. Where did that sheet come from?

A. I couldn't tell.

Q. No knowledge, information or belief?

A. No, sir.

Q. In whose handwriting are those papers that I show you now (handing witness papers)?

A. I don't know.

Q. Whose handwriting do they resemble?

A. They resemble Bird's handwriting.

Q. You notice the heading, "Return of gold bullion from the United States Assay Office to the North

1000 James M. Sigafus.

Homestake Mining Company, White Oaks, New Mexico"?

A. Yes.

Q. That was a mine owned by you, was it not?

A. Yes, sir.

Q. And that printed heading is at the top of each of those bullion returns, is it not?

A. Yes.

Q. Is that regular paper that belonged to you and was used by you in the business of that mine?

1001 *Mr. Wetmore:* I don't quite see the relevancy of this. Here is a matter with some other mine.

Mr. Stickney: Oh, no. These three sets of figures appear in that Burnham report as the returns of the Good Hope Mine, and it is another mine of this defendant, and here they are in Bird's handwriting without a doubt, and we shall prove that the figures are put right in here as the figures of the Good Hope Mine.

1002 *Mr. Wetmore:* I object, upon the ground that there is no connection proved with this defendant, or the cause of action set forth. Apparently he wishes to prove that this is in the handwriting of Mr. Bird, and are returns from the North Homestake Mining Company, in which Mr. Sigafus had an interest, and, Mr. Stickney, that these returns correspond.

Mr. Stickney: Those returns, which are on this defendant's own paper——

Mr. Wetmore: It is not on the defendant's own paper.

Mr. Stickney; Oh, yes. That they appear stated in this Burnham report, which comes from him as the figures of the Good Hope Mine.

The Court: What period do they cover?

Mr. Stickney: For the month of January, 1892; the first one bears date February, 1892. Then, in the table underneath the figures, the return is February 1st.

The Court: Can't you give me the entire period covered?

Mr. Stickney: One is January 10th, 1892, one February 10th, 1892, and one December 10th, 1891, so that we have the three last months of the period alleged to be covered by the sheet that is included in the Burnham 1004 report.

Q. During the months of December, 1891, January, 1892, and February, 1892, were you the owner of the North Homestake Mining Company at White Oaks, New Mexico?

A. I owned a one-sixth interest in it.

Q. Who owned the rest of it?

A. Dr. Hunter owned two-sixths, J. Everett Bird owned one-sixth, and his wife two-sixths.

Q. Was this the paper used for the return of that mine, to your best recollection and belief?

A. I don't know. 1005

Q. Did you ever see a paper of that sort before?

A. I might.

Q. Where did you see it?

A. I don't know.

By the Court:

Q. Haven't you any knowledge yourself about the mint returns of that mine during the period covered by these reports?

A. It was all sent to the Chemical Bank in New York.

1006 James M. Sigafus.

By Mr. Stickney:

Q. And that is your bank, isn't it?

A. Yes, sir.

Q. And this bullion was sent to your own bank?

By the Court:

Q. You probably took interest enough in the matter to know what the mint reports were that were coming from your Homestake mine?

A. Those are not mint reports.

1007 Q. What are they?

A. I don't know. They are a copy of some paper or other. They are not mint returns. I have got all of them, 200 or 300 of them.

Q. Don't they purport to be copies of the mint returns?

A. I don't know what he claims them to be. I never saw them. I never saw any paper of that description or that character.

By Mr. Stickney:

Q. Never saw any paper of that description or

1008 character?

A. No, sir.

Q. Are you watching your words?

A. I am watching them, yes, sir. The mint receipts are all here and I can produce them.

Q. Produce them.

A. I cannot to-day.

Q. Produce them now.

A. I cannot.

Q. You just said they were all here.

A. They are here in New York, in this city.

Q. Where is Mr. Bird?

A. He is at home, I suppose.

Q. Where is his home?

A. 96th Street.

Q. In this city?

A. Yes, sir.

Q. When did you last see him?

A. Sunday.

Q. Is he attending here; has he been in attendance here for the purpose of testifying?

A. No, sir.

Q. Do you intend to produce him to testify?

A. I don't know.

Q. Where is it that the mint returns which you say you have in your possession or custody somewhere, of the North Homestake property, now are? 1010

A. I can get them.

Q. Where are they?

A. I don't know.

Q. How do you know you can get them if you don't know where they are?

A. I will take the chances on that.

Q. And have you no knowledge where they are now, at this moment?

A. No, sir.

Q. Where did you last see them?

A. I have not seen them in two years.

Q. Where did you last see them? I did not ask you when.

A. In California. 1011

Q. And you have never had them with you here in New York?

A. No, sir.

The Court: Mr. Stickney, don't pursue that. I wish you would just show him the Burnham report annexed to Col. Egan's deposition and ask him if there were any such returns as purports to be in that report for the mining property in question.

Q. Now I show you again this sheet containing the return of the gold bullion from the United States Assay Office to the Good Hope Consolidated

gold mines and I ask you to produce now the returns of gold bullion for the Good Hope Consolidated Gold Mine, covering the period from March 4, 1890, to and including February 1, 1892. Produce them please. Did you hear my question?

Mr. Wetmore: We will produce them.

Q. Were there any returns for the Good Hope Mine, genuine ones, that agree in dates and figures with those that are set forward on that sheet?

A. Some of them.

1013 Q. And that is all you will say? How many?

A. I can tell you if I look at them.

Q. Tell me exactly?

A. Here are two; they are duplicates; they are inserted twice.

Q. What?

A. Here is May 17th, 1891, 127 ounces and seventy-two one-hundredths; and here is inserted——

By the Court:

Q. Those are genuine?

A. They are inserted twice.

1014 *By Mr. Stickney:*

Q. That is not what we are trying to get. What we want you to point out, if you can, is whether any that purport to be returns from the Good Hope Mine represent the actual returns of that mine?

A. They are cut up so——

Mr. Wetmore: If your Honor please, Mr. Johnson has checked off on the mining receipts that we have—whether they are the whole mining receipts or not I do not know—those that do not appear in the mining receipts—which is the question that Mr. Stickney is asking.

1015

Mr. Stickney (to the witness): These (Plff.'s Ex. 34) are the ones then given by your counsel which do not appear vouched for by actual receipts. Will you adopt that?

The Witness: I don't know what it is.

Mr. Wetmore: We will admit that.

The Court: Well, it is stated by counsel.

Q. Your counsel now present a statement of bullion receipts, of figures of bullion receipts, given in the Burnham report for which you do not have mint returns in that period, 1891, and the first two months in 1892, and they foot up $33,054.18. Now 1016
will you be kind enough to give us the mint returns, the genuine receipts which you do have in that period. You probably have some statement of them.

The Court: Give me the amount, Mr. Stickney, of that.

Mr. Stickney: $33,054.18. Those are the ones for which they do not have genuine returns.

The Court: Now, what is the total amount of the returns in this Burnham report?

Mr. Wetmore: That figures up $51,880. 1017

Q. Now, give us the original returns which you do have for that period.

Mr. Wetmore: There they are (producing paper).

Q. These cover way back in 1890, and a big period, don't they?

A. Three in 1890, I think.

Mr. Wetmore: They commence March 4, 1890.

The Court: Then, we must assume it to be a fact in the case, unless changed hereafter

1018 James M. Sigafus.

by the evidence, that as stated in the Burnham report, $51,880 is the true return——

Mr. Stickney: No.

The Court: No; I see.

Mr. Stickney: That $33,054 is the false; that is the item which is put in there without any voucher for it.

The Court: $33,054 of the $51,800 are fabricated?

Mr. Stickney: That is it, your Honor. Coupled with that, your Honor will bear in
1019 mind the statement in the summary of the report, that 2,434 tons in that period produced $57,000 in bullion.

Q. Have you got any statement already prepared of the exact bullion returns for that period of the Good Hope Mine?

A. They are there.

Q. Oh, no. I know the original returns are there, but have you any statement among your papers, a table showing the exact bullion returns for that period?

A. No, sir.

1020 Q. Don't you know that those bullion returns for that period correspond exactly with the entries from the Wells-Fargo books that we put in evidence here?

A. No, sir.

Q. Will you please take my question instead of continually going back and pointing to these?

Mr. Stickney: I shall have to put some questions over again.

The Court: I wouldn't spend any time. I don't wish to dictate, but there are some things that seem to be clear.

Mr. Stickney: I will take your Honor's suggestion, most readily.

Q. You have already stated that Mr. Bird did keep some books and papers?

A. I suppose he did; yes.

Q. Won't you raise your voice? Do you intend these gentlemen to hear you, or not?

The Court: Try to raise your voice. You can if you will. It is a matter of some interest to you, and if your testimony is to be of any value at all it must be heard.

Q. From what source were the figures in the Burnham report taken as to your expenditures? 1022

A. I know nothing about the expenditures, nothing whatever.

Q. Do you know of any source from which they were taken except statements make by Bird in some form?

A. No, sir; I know of no source from which they were taken.

Q. Do you know of any source for either of those sets of items in the Burnham report except Mr. Bird and yourself, and your books and papers?

A. No, I don't know of any.

Q. What disposition was made of the bullion that did come out of the mine? 1023

A. Sent to Wells-Fargo Bank, the Woolworth Bank, and some to the Selby Smelter, and some to Price & Sons, San Francisco. When I sent bullion I took receipts for it. The receipts I have just mentioned, they are all there.

Q. I come now to the mill run. Did you give Mr. Cheatham any directions whatever about the mill run?

A. No, sir.

Q. In any form or shape?

A. No, sir.

Q. Did you give him any directions about those sacks that had been mined by Kingsbury?

A. No, sir.

1024 James M. Sigafus.

Q. Did you have anything to do with the mill run?

A. Yes; I was my own mill man. They didn't furnish a man. Egan told me to go on and make the mill run, which I did. That is all.

I heard Mr. Jepson testify as to two conversations that he had with me there at the mill. No such conversations took place; nothing of that sort transpired between me and him.

Q. Were there specimens of ore in Doran's house?

A. Not that I know of.

1025 Q. Now, as to these lengths in the second level, you admit that there were boards at one end, don't you?

A. I never saw them.

Q. Do you deny it?

A. No, sir.

Q. That is at the south end. At the north end, do you admit or deny, that it was filled in or closed up?

A. It was closed up.

Q. You have said already that you did not have anything to do with Mr. Burnham's examination?

A. I was not there. I had nothing to do with it whatever.

1026 Q. I show you a letter dated June 11th, 1891, addressed to Doran. Who wrote that (handing witness a paper)?

A. I did.

Q. I call your attention to this clause in it, about 12 lines from the beginning. "That will make this lower drift about 900 to measure, which will then give me more than twice the measurements we had made by Mr. Burnham." Is that in your handwriting in that letter?

A. Yes, sir.

Q. Do you wish to repeat your statement now that you had nothing to do with Burnham's examination or measurements?

A. I wish to explain it.

Q. Do you wish to repeat your statement?

A. I don't know what you mean by that.

Q. You don't know what I mean?

A. No.

Q. Now, make any explanation you like.

A. By driving it twice the distance we had double the amount of tonnage overhead. That is all.

Q. And that is all the explanation you have to make of your expression when you speak of measurements, "we had made by Mr. Burnham"? 1028

A. Yes, sir.

By the Court:

Q. Did you understand that this Burnham report was obtained by Mr. Griffith from you, or that he wanted to get it for the purpose of use in negotiations for the sale of the mine?

A. No, sir; he did not want it for that; only to ravel out the Luckhardt report. To compare the technicalities in the Luckhardt report; he wanted it to verify with them; compare them.

Q. Do you say that he stated that to you?

A. Yes, sir; and agreed not to use that in any 1029
manner, shape or form?

Q. Agreed not to use it in any manner?

A. Shape or form in connection with the sale.

Q. Why did he make that agreement?

A. Because Maxwell was his partner in the prior bond.

Q. I know; but were you unwilling to have him use the Burnham report?

A. Yes; or anybody else.

Q. Why?

A. Because the Burnham report was one that was not reliable.

Q. Did you understand the Burnham report to be an untruthful report?

1030 James M. Sigafus.

A. I knew it was. I knew it could not be otherwise.

Q. So you made it a condition with Griffith that he should not use it?

A. Yes, sir.

By the Court:

Q. Who did you suppose was responsible for the falsehoods in the reports?

A. Burnham and Maxwell.

Q. Did you suppose they had colluded together
1031 for the purpose of getting up a fictitious report of the mine?

A. Let me state. Block No. 333——

Q. Just answer that question. Did you suppose that Burnham and Maxwell had colluded together for the purpose of manufacturing a fictitious report upon the mine?

A. They raised their figure.

Q. You don't answer my question exactly. If you can answer it specifically I wish you would.

A. I will try to.

Q. Did you understand that Maxwell and Burnham had colluded together to produce a fictitious
1032 report upon the mine?

A. I didn't understand it from anybody, only from the description ——

Q. I don't care who you understood it from, but was it your understanding at the time you had Griffith promise that he would not use it?

A. Yes it was. One reason is that that Block No. 333——

Q. I don't want reasons.

A. They raised it 5,000 tons from the original one.

By Mr. Stickney:

Q. Didn't you testify yesterday that you never

read that Burnham report until the time of Egan's examination last summer in California?

A. I never read it through until last fall.

Q. Didn't you so testify?

A. Yes, sir.

Q. How did you know it was false, then.

A. From the rumors going around.

Q. You testified that you made that a condition with Griffith that he should not use it, because you knew at that time that the statements in the Burnham report were untrue?

A. Yes, sir. 1034

Q. And you stated yesterday, on your oath, that you never read the Burnham report until the time of Egan's examination, which was in the year 1895?

A. I never read it through.

Q. Now, you can say anything you like to the jury to explain that.

A. I never read it through until last fall.

Q. You made it a condition with Mr. Griffith, in the year 1893, that he should not use that, for the reason that you then knew the statements were false. That is your testimony, is it not? Now, answer that.

A. The tonnage was raised nearly a quarter—just about a quarter. 1035

Q. Is that all the explanation you wish to make, and, to your mind, is it satisfactory?

A. Yes, sir.

Q. Where was it that you had this conversation with Mr. Griffith in which you made him agree not to use the Burnham report?

A. At Riverside; about the 27th of September.

Q. Whose is that letter (handing witness a paper)?

A. Mine.

Q. Let me call your attention to this. This is to Doran, too, isn't it?

A. Yes, sir.

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Q. August 26th, 1893.—"Yours received last night. Am glad that you are improving, and hope that you will get entirely well. I seen Carly last night. He had a letter from Everett, but it was the same old story." Everett was who?

A. I don't know.

Q. You don't know?

A. Everett who?

Q. I ask you, who was Everett?

A. I don't know.

Q. What is your son-in-law Bird's name?

1037 A. J. Everett Bird.

Q. Do you mean to tell the jury that you thought that referred to anybody else?

A. I don't know what it refers to.

Q. You don't know?

A. No.

Q. That is your own letter, is it not?

A. It is a clause in it.

Q. The whole letter is in your own handwriting, isn't it?

A. Read the whole letter. It will explain itself.

Q. "Am glad to hear that you are improving, and hope you will get entirely well. I seen Carly last night." Who is Carly?

1038 A. I don't know. I don't know anybody by that name.

Q. Do you know anyone with that first name?

A. No.

Q. "He had a letter from Everett." Who do suppose the Everett meant there?

A. I don't know.

Q. Everett Bird is your son-in-law?

A. Bird is; yes.

Q. Everett Bird, is it not?

A. J. Everett Bird.

Q. And do you mean to say to this jury, on your oath, that you don't know that that referred to him?

A. No, I do not. It may, but I don't know.

Q. Is there anyone else that you believe for an instant that it referred to except your son-in-law, J. Everett Bird? Is there any other living person that you believe for one instant that it referred to except your son-in-law?

A. I don't know. I could not answer the question.

Q. Would not answer it?

A. I cannot answer it.

Q. "But it was the same old story. Still, he had hopes that he might find some suckers that had not been trapped yet." What did you mean by 1040 suckers?

A. I don't know.

Q. Is there anyone else who knows better than you do what you meant by that phrase?

A. I can't answer that question.

Plaintiff's counsel offers in evidence a sheet of paper containing bullion receipts; it is marked Plaintiff's Exhibit 34.

Redirect-examination by Mr. Wetmore:

Q. There are some letters here—three—one of 1041 November 7, 1890; one of November 21, 1890, and one of May 7, 1891, written to Mr. Doran. Do you remember where you were at that time, November, 1890, and May, 1891?

A. I think I was in Tarrytown, New York, in 1890. In 1891 I was in White Oaks, New Mexico, May 7th, 1891. Mr. Doran was in charge of the mine; he was foreman at that time.

Q. In 1890, up to May 7th, 1891, how much of the mine had been opened?

A. About 400 feet north on the upper level, and less on the lower level, 250 feet south. I was receiving the reports that have been put in evidence

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from Doran. Every other day he sent me a report of the progress of the work.

Q. Had anything more been done than to run the shafts and run the levels to those distances which you have just mentioned, in the way of stoping or opening out, and if so, what?

A. 75 feet north of the first level there was an up-raise 30 feet; 75 feet from that another up-raise, 6 feet by the width of the fissure; 75 feet north of that was another, and that was the end, at May 7th, of the stoping on that level On the lower
1043 level, the winze went through at 120 feet, the up-raise, and another one, about 20 feet, on beyond that, some 75 or 100 feet—I don't know just that distance—and one to the south, on the lower level, about ten feet.

Q. Does this diagram show, substantially, the condition of the mine at the time these letters were written?

A. Yes, sir, on the 1st of May. There was no stoping. There was an up-raise after starting the stope.

Diagram offered in evidence. It is marked Defendant's Exhibit.

1044 Q. In your letter of November, 1890, you say to Mr. Doran: "Keep the drifts going as well as you can, and where there is a good ore-shoot be sure and have it timbered so you can show to good advantage, should this man Keyes come down to look it over. The drifts explain themselves." What do you mean by timbering the ore-shoot there?

A. To leave it so they would not cover the whole top of the drift; timber it so that it would hold, but not cover the hole.

Q. Who was Keyes?

A. I don't know—Doran's friend.

Q. In your letter of November 21, 1891, you speak

in reference to the vein in No. 2 shaft: "I think that this drift, No. 2, north, is off of the vein, and I think we are too far to the west, and to drive a cross-cut to the east might find ore. Be sure you get the right vein, and then we will let this drift rest for a while, and do nothing except make an up-raise for the ore." What part of the level No. 2 were you off the vein then?

A. They were within 40 or 50 feet from the shaft, and they were running in on the hanging wall. Afterwards they made a little turn in the east, and went on and struck the foot wall. It is about 1046
where that break is, where the turn was made. It was within 50 feet of the shaft.

Q. You say, in your letter of May 7, 1891, speaking of the ore: "It is a good thing to let it stand for measurement when the mine is measured." Further on, in the same letter, you say: "It is of no use, until you open up more ground, to measure," and then, "The ore continues south of the south shaft before sinking deeper for it. As it goes further south it will measure faster. We are 344 deep; so, by driving these drifts, it will increase the ore faster." What did you refer to there?

A. We measure all the ore that is over the drift 1047
—from the drift to the surface—cutting out surface displacements and the shaft above. If you were 100 feet, and you drive another 100 feet, with an equal amount of ore, it would have double the tonnage.

Q. Then the further you drove the drift the greater the measurement?

A. Yes, sir. If that was driven 700 feet further, and the ore was equal, you would duplicate the north measurement there.

Q. So you say: "By driving these two lower drifts in, will increase the ore faster, but I think that north lies the greater body of ore that will make this mine valuable." You also write: "I

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wrote to Mr. Bird to have shaft started on that east vein," etc. Where was that?

A. 26 feet east of the main working shaft, and about 12 feet to the south of the shaft. We cut the vein by digging out for a coal-bin and a passageway to drive the horses in, and this drift would have been directly under the horses' feet if it had been sunk. It was over the east wall of the fissure.

Q. "So, as I think there would be no rain for some time, it will do to let down on it a little; then, if it plays out, we can fill it up again." Fill up
1049 what?

A. Fill up the hole—the shaft. That was directly where we drove in to unload the coal. That work never was done, though—none of it. Mr. Bird had a location claim on the Annex. He did not hold any of the title to the property of the Good Hope Mine. Mr. Bird was at the mine two or three months some years; he began there in 1889; he stayed until the spring of 1891, and then he moved to Caronado. He was sick. He came from there back to New York, and he stayed here until December. He went into an institution in 1893. In 1892 he was living in Los Angeles, 70 to 75 miles from the mine. He bought a little tailor-shop
1050 there. He kept that three or four months.

Q. Then what did he do?

A. Nothing. He lived in Los Angeles a little over a year; then he moved up above San Francisco to San Raphael, in August, 1893. He remained there until the following spring—1894. He went to an institution at Los Gatos. He was there twice. He came out first sometime after August, and then he lived up in the north part of the State of California.

He stayed there the full term that they keep them; I don't know how long they hold them.

Q. During what time did Mr. Bird have any

charge of, or access to, any documents pertaining to the Good Hope Mine?

A. All the time he was at the mine. It was off and on. He stayed at the mine two and three months at a time until the spring of 1892, when he went away for good.

I first heard of Burnham through Doran about the first day of May, 1891. He had been down to Los Angeles, and he told me that Maxwell would like to send an expert up there by the name of Burnham to examine the mine. Maxwell had no bond on the mine at that time. That was the first 1052
occasion of Burnham coming to the mine. Doran asked my permission to have him examine the mine. I gave him permission on certain conditions. That he would leave a duplicate of each sample at the office, labelled and marked where it came from, and give me a duplicate report when he made it. I went East then and was not there when he made his examination. The report was mailed to me at Tarrytown. I next saw Burnham some time in 1892. He came to the mine to measure the drifts again. I had had no communication with him in the meantime. At that time I was with him under ground. He figured them out. The
entire width was 17 1/2 inches—of the pay streak. 1053

Q. Did you pay him for that measurement?

A. No, sir.

Q. Who sent him there, and in whose behalf was he acting?

A. I don't know.

Q. But you knew the measurement and had a memorandum of it?

A. Yes, sir.

By the Court:

Q. Did you know at the time whom he was supposed to be representing?

A. Maxwell, I supposed. I didn't know.

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By Mr. Wetmore:

Q. At that time did Maxwell have a bond on the mine?

A. No, sir. He had not had one previously. Maxwell did have one subsequently. I think some time in March—this was in February. At that time they had been wanting a bond for some time. Doran was doing the negotiations on behalf of Maxwell, as I understood him, and Burnham—the three of them. They were negotiating for a bond.

Q. Was there any other bond taken out by Max-
1055 well or Doran or any of them on that mine?

A. There was one by Tom Waters in November following.

Q. What had he to do with any one of them?

A. He was a mining engineer.

Q. But what had he to do with either Doran or Maxwell or any of the others?

A. Maxwell was a prompter, and he brought him there. It was through Maxwell that he came there.

Q. And Waters got a bond on the mine?

A. Yes, sir.

Q. When did you have any knowledge of a sec-
1056 ond or third edition of this report having been made by Burnham or by any person?

A. In the summer of 1892 they made a new report they said.

Q. References are made in the Burnham report to a map. Was there a map annexed to his original report of which you had a copy?

A. Yes; he had a map. I hadn't seen any. He didn't send me one.

Q. This edition that has gone by the name of the Burnham report--when did you first see a copy of that?

A. Some time in June, 1892. Maxwell sent it to me.

Q. This Burnham report was the property of Maxwell?

A. Yes, sir. So far as I know, he was the one who paid for it.

Q. In reference to examining the mine or the sale of the mine, did anybody, from June, 1892, up to November, 1893, come to the mine and ask to look at it or examine it, or did you enter into negotiations for the sale of the mine with any person who said they had seen that Burnham report?

A. No, sir.

Q. Now, you are sure of that? 1058

A. Yes, sir.

Q. Did the one that he sent have a map?

A. Yes, sir.

Q. What has become of that map?

A. I guess it is around somewhere. They made blue prints.

Q. Did you subsequently get any map and give it to Mr. Griffith?

A. No, sir.

Q. Did you furnish him with a map?

A. No, sir; none at all. I received the first Burnham report about June 1st, 1891; it was mailed to me. They examined it from the 6th to 16th of May, 1891, and this report was the result. 1059

Q. On the 27th of September, as you have already said, Mr. Griffith asked you for this report, and particularly for the maps?

A. Yes, sir; saying that he wished to compare the maps with the Luckhardt reports.

Q. Was there any reason derived from a claim for commissions why Mr. Griffith said he was unwilling to use the Burnham report, or wouldn't use it, in making a sale to Maxwell?

A. Yes. He said that he didn't want Maxwell mixed up in it; that this was his negotiation and he wouldn't use it from the fact that Maxwell would claim a commission if this report was used in the

sale of the property. And Maxwell afterwards did. The suit is pending now.

Q. There appears in this copy of the Burnham reports that has been put in what purports to be a table of bullion returns that is manifestly incorrect. Have you any knowledge, or did you have any knowledge, of Mr. Bird's furnishing any information for that report?

A. No, sir.

Q. In June, 1892, you say, you first saw that copy?

1061 A. Yes.

Q. Mr. Bird had been there from January along in that year?

A. He was not there then; he was at Los Angeles. He moved to Los Angeles the first of May. Since the first of May he had been at Los Angeles. He had had the returns of the mine.

Q. Did he transmit the mint receipts to you?

A. He kept the mint receipts until I asked him for them, prior to his moving to Los Angeles.

Q. After he moved to Los Angeles he did not have anything to do with them?

A. No, sir.

Mr. Griffith's first bond was on the 22d of May.

1062 Then there was either a second bond, or an extension, on the 5th of July, and that bond was extended by me on the 17th of August.

Q. Between the 5th of July and the 17th of August had you received any communication, or entered into any negotiations with parties in New Orleans?

A. Yes, sir; there was a party there made an offer of $350,000 for the mine, about August 20th. Mr. Griffith's bond was running.

Q. An arrangement was made, as it appears, by which Mr. Griffith was to go to New Orleans?

A. Yes, sir; he telegraphed me to meet him at San Bernardino on the 24th of August, and then he was on his way East. I told him I was going to

1063

New Orleans to negotiate with the party there, and he said he would take that matter up, as he was going East, and we drew up a paper there for him to negotiate that trade, and that only. Then I gave him instructions to go there.

Q. And his instructions were contained in a paper, stating what he might do?

A. Yes, sir.

Q. And is that what is referred to in the clause in your agreement of the 24th of August?

A. Yes, sir; that agreement terminated with the termination of that negotiation, or should have.

1064

Q. That was the contract made with Mr. Griffith for $230,000, which gave you the right to sell the property before the first of January, 1894?

A. Yes, sir; it was under that contract.

Q. In regard to the north end of the second level south. You have heard the evidence in this case in regard to the boarding up of the lower opening of the shaft and the sideboards to create a current of air. Who put those up?

A. I don't know—the workmen, I think. I gave no orders about it one way or the other. I didn't know they were up.

Q. When did you first learn that they were up?

1065

A. Last summer. I was there once when they were sinking the shaft and the platform was there.

Q. But these boards were not there?

A. I did not notice any.

Q. I forgot to ask you in regard to the use of quicksilver during this mill run. Was quicksilver used in any way there in an unusual manner?

A. I didn't notice it but twice; twice there was an excess of it; twice it was running very badly during the run—that is, too much quicksilver was put in.

Q. How did that make itself visible?

A. It softens the plate and skims off the gold. The amalgam runs with it if there is too much

1066 James M. Sigafus.

quicksilver put in. I noticed that too much was running over, and spoke to Jepson about it, and had him reduce the quantity.

Q. Did Mr. Jepson make any remark to the effect that he would have to throw a cupful in?

A. No, sir.

Q. (Papers shown witness.) These are the mint receipts that you have identified, are they not?

A. Yes, sir.

Defendant's counsel offers the papers in evidence; marked Defendant's Exhibit G.

1067

Those are all there is, to my knowledge.

Q. Those are the ones that you said amounted to about $62,000?

A. Well, I guess a little under that; somewhere about $61,000.

By the Court:

Q. Did you understand that Egan's object in making the mill-run test was to ascertain the accurate value of the ore in the mine?

A. No, sir.

Q. What did you understand it was for?

1068 A. He told me that it was for the purpose of testing the mill, to see whether he should buy a new one, or duplicate that one.

Q. Just for the purpose of testing the mill, to see whether he would buy a new, or duplicate that?

A. If the gold was saved close enough to justify him in duplicating that.

Q. Then it was only for the purpose of ascertaining how good the mill was?

A. Yes, sir; how close it would save the gold. If it would leave $2 in the tailings, why that would have been extra good. If it would leave $10, or $5, or $4 in, he would not consider that it was a proper mill for the working of the mine.

Q. It was for the purpose of testing the value of the mill?

A. That is all.

Q. Did you suppose that was the only object of making that three days' mill run?

A. Well, not exactly.

Q. What other object do you suppose he had?

A. To get an average of what the mill would save and the ore would yield.

Q. Did you understand then that one of his objects was to ascertain the average of what the ore would yield?

1070

A. Yes, sir.

Q. Did you know what the result of the mill run was after he got through with it?

A. After figuring up the retort, there was about $650 in the retort.

Q. You knew what the ore averaged according to that return?

A. No, sir; I did not.

By Mr. Wetmore:

Q. Won't you explain that; what do you mean?

A. If he took three cars to the ton, we would have an average about that—then it would average about $17 a ton. 1071

By the Court:

Q. Really the three cars were a good deal more than a ton?

A. Yes, sir. The three cars ought to hold pretty nearly two tons.

Q. Did Egan understand that?

A. He did. He measured the car, and took three cars to the ton. That was his own proposition.

Q. Do you know what object he had in making a mill test with three cars that weighed nearly two tons?

A. I could not give his object; no, sir. He certainly ought to have known, being an expert.

By a Juror:

Q. I understood you to say that this offer of $350,000 was a net offer?

A. Yes, sir.

Q. Was this transaction a net offer?

A. Yes, sir.

Q. What did Mr. Griffith mean when he said he did not want to use the Burnham report on account of Maxwell being mixed up in the commission?

A. Maxwell sued him for half the commission.

Q. Where did that commission come from—from you?

A. No, sir; from these other parties. Mr. Maxwell claimed, I believe, that there was a written agreement of partnership between them.

A new mill was erected by Egan. It was a twenty-stamp mill; a different kind of mill.

By a Juror:

Q. Why couldn't Mr. Egan have ascertained the working of the mill from sampling the tailings which were already there?

A. The light stuff floats down the stream and leaves only the heavier sulphurets around the mill. He could assay that, but it would be high.

Q. What steps did he take?

A. They saved a cup-full every half an hour of the pulp that came out of the mill, and poured it into a receptacle and let it settle. Then he took that and dried it, and assayed it for the results. That took slum, coarse and fine sulphurets, and barren material.

C. You could have done that just as well if you had been running the mill?

A. He didn't do it. He wasn't in the mill.

Q. What had that to do with three cars per ton?

A. There was no scale there, and the ore was estimated; he estimated that it took three car loads for a ton.

Q. But what had three cars to the ton to do with proving whether the mill was good or bad?

A. In assaying you get 2,000 pounds to the ton, and it don't matter what you take it out of.

By Mr. Wetmore:

Q. You had no knowledge of what Egan wanted the mill run for, except what he himself stated?

A. No, sir.

Recross-examination by Mr. Stickney:

Q. He could have tested it then by putting in any number of tons he chose—five or ten, couldn't he?

A. Yes, sir. He could have tested that many tons; but he had no business to make any report under a 100 or 200 ton test.

Q. I am only asking you how he could have tested that mill. What relation to testing the mill did the number of car loads of which they kept the tally down in the mine have?

A. I don't know anything about the tally. That was his own proposition, to take three cars a ton.

Q. Have you ever learned that they did keep a tally of the number of loads that came up?

A. They always did. They did the time of the mill run. It was to tell how many car loads came up.

Q. Do you know, or did you know at the time, whether any directions were given as to taking that ore fairly from all parts of the mine?

A. I suppose it was. Egan gave the directions.

Q. You have testified, in answer to Mr. Wetmore's questions, that you understood that those

1078 James M. Sigafus.

different editions of the Burnham report were the product of Maxwell?

A. Yes, sir.

Q. Who told you that?

A. I don't know.

Q. Didn't you testify that you didn't know anything about who made these reports?

A. I think not—specific ones.

Q. I call your attention to a passage in your testimony of yesterday as to the Burnham report: "Do you mean to say that you never read the
1079 Burnham report? A. I read the original report." Did you give that testimony yesterday?

A. I read it through once. By original, I meant the copy of the original that he sent me.

Q. I call your attention to one other answer that you made yesterday: "Q. This is not a copy? A. No, sir; they made three or four batches." Batches of what?

A. You are mixing that up, I guess. I don't understand what you are getting at.

Q. Do you understand your own answer?

A. They made three or four additions.

Q. Your words, taken down by the stenographer, were: "They made three or four batches." Batches
1080 of what?

A. As many as three times those reports have been circulated.

Q. They made them, you say. Who made them?

A. Maxwell.

Q. And that you wish to stand on, do you?

A. Yes, sir.

Q. I show you your copy of the Burnham report, which states, on the very last page, the tonnage, 2,036 tons in block No. 5. You stated that when you saw this latter copy you noticed that there was a change in the tonnage?

A. There is in Block No. 1.

Q. The change that you noticed is on that very

last page, isn't it (handing the report to the witness)?

A. No, sir; I think it is in the dimensions. Here it is (indicating); it is block No. 1, 333 x 245; tonnage, 13,599.

Q. What else in this copy of the report did you look at? You noticed the difference in the tonnage of one block.

A. Yes, sir; in every block.

Q. Then you seem to have looked at this paper with some care?

A. Yes; I have looked at it. I have had it since last summer. I looked at last sheet of it; I looked at it all. 1082

MRS. AUGUSTA C. A. SIGAFUS, sworn and examined as a witness for the defendant.

By Mr Wetmore:

I am the wife of the defendant. I was living with him at the Good Hope Mine when he was there. I was there in November, 1893. In November of that year. I remember the occasion of Colonel Egan's visit. 1083

Q. During the time Colonel Egan was visiting there, or at any time, did you and Mr. Sigafus as you were retiring one night have a conversation like this, or substantially like this, or in any manner like this: Mrs. Sigafus said, "How are they getting along with the examination?" Mr. Sigafus answered, "Pretty satisfactorily, I guess." Mrs. Sigafus said, "How about the mill test?" Mr. Sigafus said, "I fear the ore being put through the mill will not equal the assay; that is all the fear I had." There were some other words that I did not catch. Mr. Sigafus then said, "Where is that pan of sulphurets and coarse gold?" She answered him,

1084 "Up stairs in Mrs. Doran's kitchen." She said, "What are you going to do with it?" He answered, "Put it in the mill, of course." Did any such conversation as that occur?

A. No, sir.

Q. Was there any such pan in Mrs. Doran's room?

A. No, sir; I never knew of any.

Q. Did you go up-stairs and get it the next morning?

A. No, sir.

1085 Q. During the time that you had lived there prior to that time had there ever been a fire in the grate in your bedroom?

A. There had not.

Q. That was the chimney which was immediately below the chimney in the room above?

A. Yes, sir.

Q. Did you get up the next morning and have any conversation with Mrs. Doran in respect to any sample?

A. No, sir; I did not. The samples which I saw, that Mr. Sigafus produced yesterday, are the samples that were down stairs. They were sitting around on the mantel and on the buffet. They are all here

1086 in the satchel, all that were there then.

Q. Did you, at any time, in conversation with Mrs. Doran say to her that she was as much interested in the sale as you were?

A. No, sir; I did not.

Q. Do you remember having any conversation at all with Mrs. Doran about the sale?

A. I did not.

Q. Were you in the habit of sitting up in their rooms in the evening?

A. I was not; I do not think I went up there more than once a week to see them.

A. J. Twogood.

A. J. TWOGOOD, by deposition, testified on defendant's behalf, as follows:

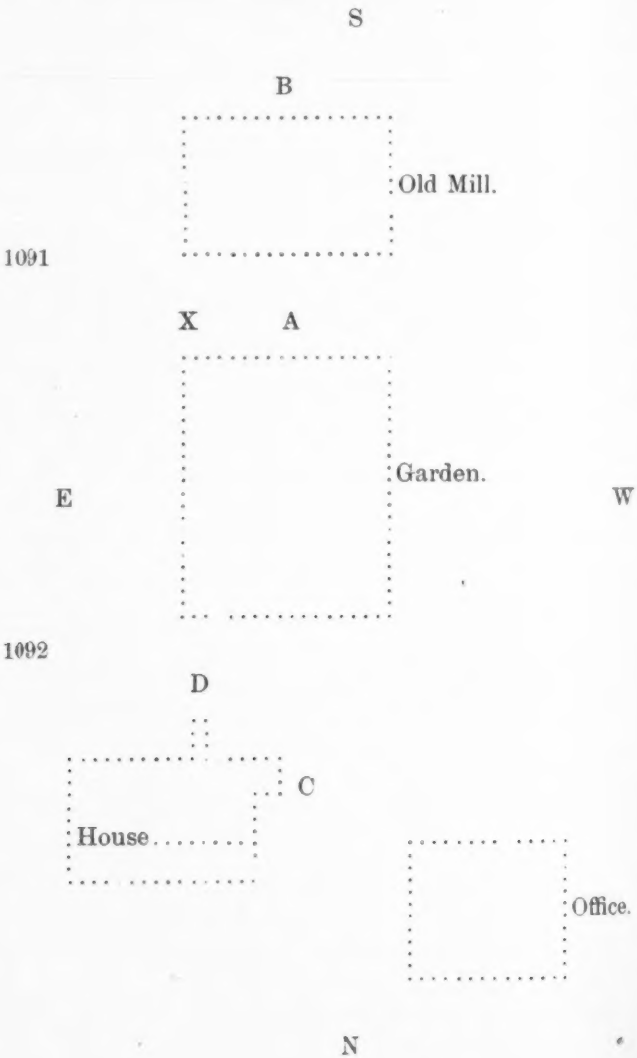
1087 I live at Riverside. I was down at the Good Hope Mine last week, the 20th of December, 1895, with Mr. A. F. White and Mr. W. J. McIntyre. I visited with them the yellow house on the hill. We went into the room on the west side and looked at the chimney, and saw if there was any cracks in it; then we went up-stairs and examined the room above. Mr. McIntyre said that Mr. White and he would go up-stairs and talk, and for me to see if I could hear it below. I went up in the upper room, placed my ear to the chimney, to see if I could hear 1088 any conversation. I could hear a rumbling sound, but could not distinguish the words. I stayed, probably, but five minutes. Then Mr. McIntyre and I went to the room below and talked, and Mr. White remained above; that lasted about five minutes. We talked sometimes in a low and sometimes in a high key, and part of the time close by the chimney. I examined the chimney, to see if there was any crack in it, and there was not. If there had been one before which had been plastered over I could have told it. I know the position of the house, the garden, the mill and the office with reference to each other. 1089

(Witness made diagram of same.)

We went to the corner of the garden, and then down to the mill. The mill is one hundred and forty six paces from the lower corner of the garden. From the north side of the house down the hill to the corner of the garden is twice as far as from the garden to the mill.

1090 A. J. Twogood.

The annexed diagram shows the relative position of the buildings and garden:



ALBERT S. WHITE, by deposition on behalf of the defendant, testified as follows:

I live at Riverside, California, and am Supervisor of the Third District of Riverside County. I know where the Good Hope Mine is. I was there Friday, December 20th, 1895, with Twogood and Mr. McIntyre. I visited the mill, house and office on the premises. I know their locations. At the yellow house I went into a bedroom in the southwest portion of the house on the first floor. Mr. Twogood went up-stairs, and Mr. McIntyre and myself talked in a loud tone of voice, walking around the room, 1094 and then put our heads in the grate as near as possible, and talked loudly there to see if he could distinguish our voices, or anything we might say. Then I went up-stairs, listened intently in the room, then put my ear to the grate, and then got down on my knees in front of the grate, but could not distinguish a word they said. It sounded as though someone was talking in a loud tone of voice. I was there probably five minutes up-stairs and the same time downstairs. I examined the chimney, to see if there were any cracks in it, and there were none. If there had been any before it would have shown if it had been plastered over. I know where the garden is. This is a diagram showing 1095 the buildings and the garden.

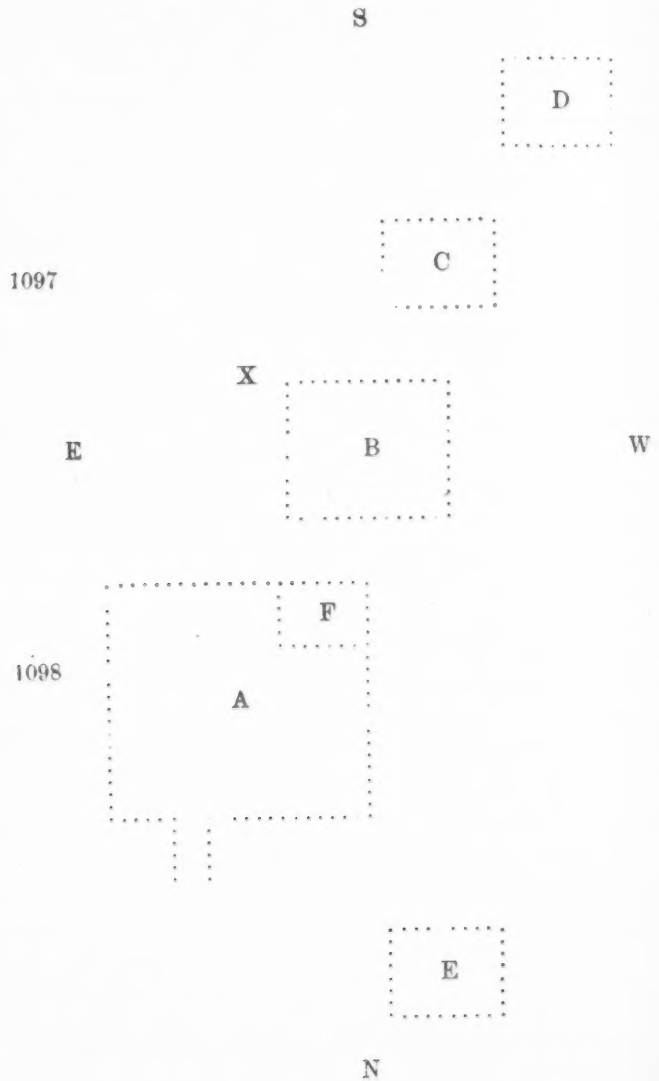
(Witness produces diagram.)

House marked "A," garden "B," old mill "C," new mill "D," company's office "E," room in house "F."

There was a window in the room facing the south. It is one hundred and forty-nine paces from the southeast corner of the garden to the old mill. It is between two and three times that distance from the back stairs of the house on the north side down the hill to the old mill. I investigated that point.

1096 Albert S. White.

Diagram received in evidence, as shown below.



1099

Mr. Twogood and Mr. McIntyre were with me. Twogood made the same examination as to time and distance. After leaving the old mill we walked over to the new mill. We went in on the first floor. We intended to enter the new mill from the first floor up-stairs to where the stamps were. The mill man, when he saw us coming, put his foot across the entrance and barred the way, so that we were not able to enter.

1100

JAMES NOLAN, by deposition taken Nov. 30th, 1895, in behalf of defendant, testified as follows:

I reside at the Good Hope Mine, in Riverside County, California. My business is mining gold, silver and copper. I have been a miner a little over fifteen years. I started to work in the Good Hope Mine about a year ago the 5th of last January, and am working there now. I am leasing what is known as the old first level; from the old first level north up towards the surface. A. C. Moorehead is my partner. The place that I am now working had been worked before. It was abandoned by the parties that run it before Boicourt.

1101

Our receipts during September were $184.40 apiece net, after paying all expenses. Those expenses are for timber, fuse, caps, candles and powder, and, of course, the royalty—20 per cent. royalty and three dollars per ton for milling. We mined during said month thirty tons of ore. We worked 29 days in getting that shipment—about $6.20 a day—something like that. There was some dead work done during that month—about three days; $6.20 per day each includes the dead work. We have not the returns for the month ending November 1st at the present time.

Q. Will the average be greater or smaller than during the preceding month?

A. I expect it to be greater. We shipped more bullion in the last shipment than we did in the first.

Cross-examination:

I am working in a place where it is very wide beeween the foot-walls and hanging-wall—that is, the main hanging-wall.

Q. What size hole do you work out at the present?

A. About two feet in height.

The way the Company have been taking it out is different to the way we are working it.

Q. You have just aimed to get a hole, to get as much as you could of gold with as little expense as possible, have you not?

A. We have. They had been taking it larger than that up to that place where we have started. They would have to put in timbers, and they have to hoist a great deal of waste when they take that amount of waste out. The first mill-run we had we counted three cars to two tons, the second mill-run 1,200 to the car. The ground was dangerous ground. I wouldn't work there for wages.

SHERMAN T. CRAWFORD, by deposition taken Nov. 30th, 1895, in behalf of the defendant, testified as follows:

I am a miner, underground. I am leasing in the Good Hope Mine. Commenced the 10th of September last. I have two partners, John Souter and John Shelley. We leased from Mr. Boicourt, the representative of the Receiver. Our returns for the month of September were $703.80. Took out forty tons—that is the first milling. From the 10th of September we made on an average of $10 a day.

It cost us $3 a ton for milling. We took out 20 cents on the dollar royalty for the Receiver. Powder, fuse and caps were part of expenses. We didn't put in the whole month in getting out this $703.80; we got that amount out in 15 or 16 days. From the 1st to the 30th of October we made $1,360.70, something like that. That represented 69 tons of ore. Up to the present day (November 30th, 1895) we have averaged $10 per day. The milling was not done in a satisfactory manner to us. I don't think their millman, Jepson, is experienced enough; that is all. I am not acquainted 1106
with Mr. Jepson, only a short time; but, according to stories told, he is not honest. I think if this man had been more experienced, that he would have understood how to save the gold better, and not let so much of it run into the concentrates, because we have got all the way from 35 to 70 dollars on the ton on the concentrates that came out of this ore, so that it is a known fact that we did not get all the gold that was in the rock. I examined the concentrates to my best knowledge, not being an amalgamator or assayer, and I took a handful of concentrates and panned it in what we call a gold pan, and I caught "quick" very little, and I found coarse rock, not as fine as it ought to be, 1107
running off the plates from the battery; but I asked the millman to fix it and he did it.

Cross-examination:

Me and my partners have cleared $10 a day since we have started. Well, we paid our men $3 a day. We had only 23 days from outside help. We are now working in a good character of quartz. It is impossible to have it pinch out in the ground we are in. We can walk plumb around the rock we are working in, and can see what we have on the top, bottom and each side. That is between 400 or

500 feet from the shaft. On the second level 400 under the ground. I didn't know, but I had an idea that I would be called to testify.

The first time we ran we had three skips to two tons, but we had a mill run on it of an average of what the mill would crush out in twelve hours, according to the stamp.

Redirect-examination:

Q. State, if you know, in what condition the
1109 mine was in when you commenced working under your present lease. State fully and in detail?

A. The mine was gutted to a certain extent. It was worked out in places to a disadvantage to the company that was running the mine, and put them to a great expense (which they didn't need to go to) to work the mine out to leave it in such a condition, on account of taking so much waste out to get what ore was in the mine; now, at the present time, where we are working in the mine, we have a stope 100 feet long, 45 feet high; the ledge runs from eight inches to three feet wide; and the company was taking out three feet of waste to get this
1110 ledge; and it is an enormous expense to take out the waste to get this ledge, because the rock is so hard to drill; and, another thing, the ore was never properly saved by the miners that worked there. This waste was taken out and thrown in piles in the stope, and the ore was shot and scattered all over this waste when it ought to have been boarded and timbered up to save the ore when shot down; when instead it seems as if ore, waste and all was shot in together. And, therefore, they were put to a big expense by wasting ore they shot down in taking out so much of this waste to get the ore. Well, the stope that we are working on was in the same shape that I speak of, being 100 feet long, 45 feet high, and opened all around; we could walk

1111

plumb around our stope; we can see just what we have at the present day the same as when we commenced working; it was not quite so good when we first commenced as at the present time, because it was not opened up to the extent of three feet at the upper end ledge as now; but it opened up to a distance of about four feet from where we would start. It opened from a foot to three feet; that is all.

Q. You have stated the condition the mine was in when you commenced working under your present lease. State, if you know, fully and in detail, how that mine, at the point you have testified to, 1112
could have been worked under proper management and better results attained; and at less expense?

A. I claim that the mine could have been worked to a better advantage for the Company, to less expense for the Company, by working the ledge and not taking out so much waste to get the ledge in the mine; they went to the expense of drilling in this hard rock to get at the ledge in the mine, and working in this foot or hanging wall, as we call it, it is much harder than the ledge, and it takes twice the time to drill a hole in waste rock as in the ledge; therefore it must be more expensive taking out all the waste to get at the ledge; and by shoot- 1113
ing this waste down, filling the mine and stopes with waste and not properly boarding it up, they would shoot the ore into the waste and lose it; in fact, they didn't get the time to sort the ore out of the waste like they would if they didn't pile it full of waste, and not have the waste in the road for shooting ore into; because I know this to be a fact, being a miner and working with the men in the mine, I know it to be a positive fact.

Our returns for the first month were $703.80. We took ore from the first chute near the shaft, a distance of about 12 or 14 feet from there to the extent of between four and five hundred feet back

1114 Sherman T. Crawford.

in the level; our lease extends from the shaft back to the lower chute, and we took ore from this $703.80 from every chute from the shaft to the far extension of our lease; that takes in the whole level —second level—from the shaft plumb back to the extent of our lease, between four and five hundred feet.

Q. Then does this return represent the average value per ton of the ore for this entire four or five hundred feet?

A. That is the distance and where we got this
1115 ore, and that is the return we got between the four and five hundred feet.

Q. Then do I understand from that answer that this return represents the average value per ton of the ore for four or five hundred running feet?

A. No, sir.

Q. How much, in your opinion as a miner, would it cost to put that mine in proper condition now for a remunerative and successful operation of the same?

A. $30,000.

Q. If such expenditure was made and the mine put in such a condition as to successfully operate the same, what then, in your opinion, would be the
1116 value of that mine?

A. $250,000.

Q. In your answer to the question that you received $1,380 return under the second month's lease, do you know how large a body of ore is at the point you are working from whence these last returns were received, and if so, have you estimated as to the value of the same, judging from the ore in sight?

A. We have taken out $703.80 on our first milling, and $1,380.60 in bullion we have already taken out, so that we know that we have taken that much out anyway, and we are running the ore the third milling through the mill the present day,

I have the receipts in my pocket to show the amount taken off the plate in 12 hours run; one was 4.11 ounces, the other was 5.01 ounces and the third 4.27 ounces taken from the plates; these experts will, of course, know what that means; and the ore is averaging the same as we have tested all the way through the milling, and I left there the tenth of November, and at that date there was 45 tons of rock, to my best judgment, left in the stope then, and we had only been taking out this amount of bullion, 47 cars, and, to my best knowledge, have 60 cars in the chute that wasn't taken out at this 1118
time; that is all I have to say. Mr. Jepson milled this ore for us.

Q. Do you know any fact or circumstance connected with the milling of your ore by Jepson that would lead you to believe that you did not receive the full value thereof in milling the same; if so, state fully and in detail.

A. Well, I have never caught the man stealing; I saw him making three gold rings out of bullion in a mold made out of the tailings taken from the mill; where he got this I don't know.

Q. Do you know of any matter or thing that you have not testified to that would be of benefit to the defendant in this action; if your answer be yea, 1119
state fully and in detail as if you were specifically interrogated in regard thereto.

A. This case is immaterial to me; I came here to answer to the truth; I have told what I know and what I know to be true, and there is no questions that I have got to answer that the lawyer has not asked me that I know about.

Recross-examination:

I have been mining five years in California and Colorado.

Q. Upon what did you base your estimate that it would take $30,000 to fix up the Good Hope Mine?

1120 George Langford.

A. Because there has not been the right kind of development done on the mine through Col. Egan's management on the mine.

Q. Upon what do you base your estimate of the value of the mine being $250,000?

A. On the character of the rock in the mine. I have been all over the mine, principally in every level in the mine. I consider myself a first-class miner, but not an expert.

Q. Have you any reason to believe that the gold out of which Jepson made three rings you spoke
1121 about he came by dishonestly?

A. I can't see in my mind where or what right an amalgamater has with bullion coming from the battery, when he is working for day's pay!

Q. Have you been promised anything for your testimony in this case?

A. There was not a thing said about what I should or should not swear to. Not a cent have I been paid.

GEORGE LANGFORD, by deposition taken in No-
vember, 1895, in behalf of defendant, testified as
1122 follows:

I reside at the Good Hope Mine, near Perris. I am a miner, and have been engaged in mining thirteen years. I have worked during that period in gold and silver mines, in Arizona and California. I have worked in the Good Hope a little over a year. I first commenced to work in there a year ago last May. I worked under Egan, Willson and Boicourt, the representative of the Receiver.

Q. What was the condition of the mine when you first went to work there under Col. Egan?

A. Well, at that time, of course, a fellow first going in any mine he don't know, but after I worked there awhile it seemed to me there was

lots of quartz in sight; in fact, where I did work, there it was between walls of three feet of ore.

Q. How many men did Egan have underground working?

A. Well, he had never under 45 men all the time I went to work.

Q. Were the men he employed experienced men, all of them?

A. Well, the men--I can't say only about the men I worked around—I considered was the general average of miners.

Q. Was the management of the mine, so far as 1124
you are able to observe under Colonel Egan, extravagant or economical?

A. No; I don't know but what the mine was all right, what I saw, the mining part of it.

Q. Was Mr. Willson an experienced miner?

A. Well, I can't tell; I never saw him below but once. For my opinion I don't think he is an experienced miner; of course he has never been down for man to understand and know what he does know.

Q. How was the stoping done by Col. Egan?

A. Well, from what I have seen in the last thirteen years I have been a mining I would not call it 1125
stoping at all, I would call it raising, sinking a shaft but raising up all the time; you have a little place to work in and don't get the ground to break in as you do in your regular stopes.

Q. Which is the better way?

A. Well, take your seven feet stope, it is better way than to raise. Any one that has been in mines wouldn't call it as good judgment as carrying stopes in regular form; my experience has been that there is ground to make as pretty stopes there as I ever seen.

Q. Was advantage taken of this by Col. Egan?

A. Well, I don't know?

Q. Or was it neglected?

1126

A. Neglected you might call it.

Q. Do you know from your observation, and based upon your experience of 13 years, of any other defect in the management by Colonel Egan as to the working of that mine?

A. No, I don't know that I do.

I am working in the Good Hope mine now, leasing from Mr. Boicourt, the Receiver's man. I am paying royalty, paying so much for milling. I commenced working under the Receiver, I think, the 6th day of October. Smith and Bates are work-

1127 ing with me. We put in all our time during October from the 6th; didn't work breaking ground all the time but fixing up. I think the 22d or 23d we had our milling. Our returns from the 6th to the 23d of October last were $1,160 some odd dollars gross. Expenses came out of that—$148 labor expenses, and our lumber, candles, powder and caps, put in at $50—we didn't get quite all at that time, but allowed that much for them—left that amount up at the office for them—then 20 per cent. royalty and $3 a ton milling. We averaged each over $5 a day; my check was for $163.33, a one-third interest.

Q. How many tons of ore did you break during that time?

1128 A. Well, I don't know exactly; we had 125 cars, and we averaged three cars to two tons, somewheres over 80 tons. We continued working after October. We have had two millings; the 22d of October we milled first. We figured it up, but we have not got all the returns—a little over nine dollars a day; we had 86 ounces of mat or bullion, and the first shipment we had 80, but we were not long in getting it out the last time. In this work there was about ten days that dead work was being done. None since then.

Q. From the first to the second shipment did you have any one to help you, beside your two partners?

A. Yes, sir; only one man broke in the ground

about ten days from the time he began, then three of us broke the ground and then hired a man after we struck ore. This dead work is included in my estimate profits per day to each.

Q. Who did your milling?

A. Jepson the second and Bates the first.

Q. Do you or do you not know whether you received the full value of the ore milled?

A. No, I couldn't say about the full value, but something is wrong there, but I don't know anything about it myself. In the first place Mr. Boicourt ordered two of us not to go into the mill; in 1130
the second place our third man Bates was a mill man, and he went in the first evening to clean up his plates, and was ordered out by Jepson—that is all about the milling. It was our ore that was being run through. In any other mill we have always had a right to be present from the time it dropped into the grizzles until I got my mat out.

Q. Were any reasons given why you were excluded from the mill at that time?

A. Well, there was talk that Jepson was a thief. I can't say but what we got our full value, but it didn't look right taking out the screens of our battery twice and not notifying us. I don't know
whether they took charge—whether they took out 1131
the screens or not—but the screens were busted, and they took them out to repair them; Boicourt told us once that the screens were busted, and Moorehead told us the second time—he was running the mill at the time. I just as soon a man would stick his hand in my pocket as repair my screens; that is all. Those two shipments were on the first level—on the old first south and the 150 feet south of the main shaft. They were supposed to be old workings and abandoned; the track and everything was torn up and levels caved in. These workings were abandoned and the track torn up, under the management of Willson and

1132 George Langford.

Boicourt. The ore I found in these old abandoned workings was good pay ore. That body of ore which we have taken out averages from two feet up to 2½. Our first 80 tons—I suppose it was about that—netted us $14 a ton; last milling was 64 tons, somewheres very close to twenty. I never done any work on the north side of the shaft; on the south side I can't see any difference between what the Company took out and what we took out. I have testified to all the returns I have received under this lease. The usual wages per day paid
1133 miners in that mine is $2.50.

Q. Do you know whether the mine, under the management of Mr. Willson, was worked economically or not?

A. Well, I think it extravagant myself; Egan's was the same; they didn't stope any different. The ore was wasted, in the first place, in the stopes, done by men that didn't know any better; that I have seen, and know myself of my own knowledge; that is all I know; it was not saved; it was wasted in the stopes.

Q. How many men did Col. Egan have underground during his management?

1134 A. As I said before, forty or sixty—somewhere along there.

Q. Were they experienced miners?

A. Well, what I have seen under the Colonel's administration was experienced, but under Willson's it wasn't.

Cross-examination:

I refused to work there any longer for the Company because they didn't send timbermen in to put timber in the vein, consequently the ground caved in.

Q. Now, in the work you were doing there, Mr. Langford, you don't mine, you just "Gopher" it, don't you?

1135

A. Well, I call it mining, from what the Company has been doing.

Q. Have you talked with Cheatham about the evidence you would give here?

A. I spoke to Cheatham; during the conversation he wanted us boys to tell the truth about the mine—all we knew.

ANTON HAPPE, by deposition, given in November, 1895, on behalf of the defendant, testified as follows:

1136

I reside four miles north of the Good Hope Mine. I am, and have been, a miner for pretty near 27 years. I have been working in gold mines since 1891, and am working in the Good Hope Mine now. I am stoping on a lease from Mr. Boicourt. I began to work the 9th of September.

I am on the bottom level; I don't know exactly how deep it is—bottom level north about 50 feet from the shaft, 60 feet more north. Pete Murray is working with me under that lease. Our returns for the first month, under that lease, were $757.70. Out of that we pay three dollars a ton for milling and twenty dollars royalty on the hundred. We 1137
also pay for our own timbers, candles, powder and fuse, and pay him for tool sharpening.

The amount of money to pay for the cost of timbering is left on deposit in the office to be paid for the timbering. The cost of timbering is deducted from the amount coming to us by Mr. Boicourt.

Q. What was the condition of the workings when you first went in there?

A. The vein was kind of split up; these workings were abandoned by the present owners. From the start from shaft to fifty feet on was caved together. These workings were abandoned under Mr. Willson's management.

1138 The ore which we took out which netted this amount of money averaged per ton not quite $14; I didn't figure only about $13.75. After paying all our expenses, my associate and I received net each about seven dollars per day.

Q. Do you know what the condition of the Good Hope Mine was, at the time it was sold to the present owners, as to development?

A. Yes, sir; it was in pretty good condition.

Q. Do you know what its condition was, under the Willson management, prior to the time that
1139 the Receiver took charge?

A. Not very good.

Q. State fully and in detail how and in what way?

A. The timbers were totting a good deal. Where the ore was taken out there was loose ground; well, it was settling about every day; it would have to be timbered—timbered in every day to keep it up; that is about all.

Egan had about sixty men underground on an average.

Q. What, in your opinion as a miner, was the management of Egan, economical or extravagant?

A. I don't know; my place I was working it was
1140 worked right; I can't tell how it was at other places.

Sigafus was a practical miner. I never saw Willson in the mine. I saw Sigafus in the mine frequently, about every week, sometimes twice a week. Egan visited the mine pretty near every day. I never saw Willson in the mine at all.

Q. When you stated that you netted seven dollars per day each, that included the dead work, didn't it?

A. Yes, sir; all figured in. We had about six days' dead work cleaning up.

Cross-examination:

Q. How wide is the pay streak that you have been working in now, Mr. Happe?

A. The pay streak is about—well, it is hard to tell; sometimes it is down a foot in the vein, sometimes in the middle or centre, sometimes crosswise, sometimes two inches, sometimes one inch and sometimes half an inch.

Q. In order to get this two inches, or inch or half inch, as the case may be, how much waste matter do you have to remove?

A. Well, we only removed for the present time 1142
about 18 inches.

Q. Can you work in a tunnel only 18 inches wide; don't you have to widen it?

A. No; it is hard working, but we do it all the same.

Q. What is your prospect now?

A. Our prospect is pretty good on the one side—on the south side; on the north side it is not very good. We prospect ore every day, take several samples out all over where we work; prospect, and if it don't prospect very well, we leave it, and make a raise where the best ore is and see how it runs, and then we take it out.

Q. Have you about run out the ore where you 1143
are?

A. On one side, pretty near.

Q. How much barren ground do you think you will have to go through before you will strike ore again?

A. Well, it is hard to tell.

Q. It is uncertain, is it not?

A. Yes, sir.

We can anticipate making seven dollars a day all the time when the ore keeps the same value. In doing this kind of work it is merely speculative. We send up three cars for two tons, but I don't know how many square feet it holds. We consider that three carloads make two tons.

1144

GEORGE LANGFORD, recalled for defendant:

Q. Could or could not the work you have done in the mine under your present lease have been done by the company at a greater or less expense than done by you, if your answer be yes, state fully and in detail if you know, based upon your experience and observation as a miner?

A. Yes, sir; the company could have done the work cheaper than the lessees could. The reason
1145 is they had their chutes and their levels opened, consequently we had to hoist out ore in buckets and windlass, dump it into a car, run it 50 feet and dump it into a chute and run it 100 feet in that chute; transfer it to another chute, run it 100 feet; run it into a car, run it to a shaft 300 feet and there on top; I will give you the way the company could have worked it; the company will work their ground, shovel it into the chute and from that chute get it to the car and run it to the shaft and then on top; the difference is the hoisting and one man to do this hoisting; we had to pay three dollars a day for the hoisting and the transfer from one chute to the other; that is the difference.
1146

WALTER SMITH, by deposition, given November 30th, 1895, on behalf of the defendant, testified as follows:

I reside at the Good Hope Mine, near Perris. I came there on the last day of last April, a year ago. I am a miner and have been engaged in mining 13 or 14 years.

Q. What kind of mines have you worked in?

A. Gold mines, copper mines; principally gold and silver and lead.

I worked in the Good Hope Mine for the present

owners under the management of Colonel John M S. Egan. I was working there when they started the big new mill. Somewhere six or eight days when they started up. I worked in the Good Hope Mine under the management of Mr. Foster for the present owners, and also under the management of Mr. Willson. I think about three months. I am working in the Good Hope Mine now. All over on the south side in every level partly. I have been working for myself since September 6th, and previous to that for the Receiver. I have been working under a lease from the Receiver, since September 1148
6th. The lease covers all ground south of the main working shaft beyond 75 feet of the main working shaft; our lease does not cover the 75 feet next to the main working shaft. On all levels our work has been continuous from the said 6th day of September last to the present time.

Q. Do you know what returns you received from the 6th of September to the 30th of September last?

A. The first shipment came to the sum of $1,165.65 gross and I think it covered a period of 36 days as near as I can remember. There was $150 wages and $50 expenses for timber and other things, and there was twenty per cent. royalty on the 1149
$1,165.56; three dollars a ton for milling 80 tons. $1,165.56 represented the receipts from eighty tons of ore. That shipment covered a period of 33 days, about; there was dead work during that time. We netted about $5.50 a day above expenses.

We also shipped the bullion I think last Tuesday morning and the returns came in I suppose yesterday.

That was about 86.24 ounces bullion and the last bullion we received went $14.65 an ounce; that 86.24 ounces represent 66 tons of rock and 17 or 18 days days' work.

Q. What did the ore average per ton under this last shipment?

1150 Walter Smith.

A. You can figure it up, 86.24 ounces bullion at $14.50 an ounce; it will go that any way, and 66 tons of ore.

Q. About how much per day did you make under this last return, if you know?

A. I think about eight and one-half or nine dollars a day, as near as I can figure it up in my mind.

Q. State why it was, if you know that you received eight or nine dollars per day for your labor this last shipment and only five dollars on the first receipt?

1151 A. Well, the first month when we started, all the old levels came in—caved in, and we had to get to work and buy timber and it took twelve or fourteen days starting up—fixing up old ground, so we could start in to work; and then we had to locate the ore, too. There was stopes that was richer than others and it took some time to find out where we wanted to work; and on this last milling we had nothing to do but turn ourselves loose into the ore, and we got 66 tons in less time and better ore. This portion of the mine from which we received these returns was abandoned by the company, and all the drifts caved in.

1152 When we commenced operations under this lease, part that we leased was in such shape that you couldn't get into it without quite a lot of work which it took so as to get to where the ore was; it was impossible to get to where the ore was—the company had abandoned it supposing they had all the ore worked out.

I received most all the time three dollars a day wages when the majority of miners received two dollars and fifty cents a day. I worked in the mine for the present company under the management of Colonel Egan. He had about 70 miners working at one time, I think; I never counted them.

If I was hiring men there was about 30 men that could work at any place in a mine.

Q. How was the stoping done in the mine under the management of Egan?

A. They wasted lots of ore by having men that didn't understand, that would fire holes at random, and the ore would go down into tho old waste pile that would go down into the gobb; they would stope this ore, and it would go through the platforms, and they wouldn't clean it up; they seemed to be working for the $2.50 a day, and not for the company's interest. All the ore taken out was taken out in the same manner.

Q. Was, or was not, the development of the 1154
mine kept up by Colonel Egan during his management?

A. Well, not as much as it should have been done. Well, they should have run more drifts, or run the drifts he did run further to try and develop more ore; they would run a drift awhile, and then would stop awhile; and whenever they seen they were to be pinched for ore they would start the drift up again and go further until they got another chute; what I mean by chute is, they would run 50 or 100 feet, then they would stope out; that is what I mean by chute; they would get a chute so as not to blast its pieces when they started the drift again. The mine wasn't managed the way it ought 1155
to have been managed at all; it was not made to work; it was a go-as you please kind of racket; I would often hear the men make the remark, "it was the slickest thing I ever struck." Such things as that; some of the men had to work hard.

Q. Have you worked long enough in that mine to estimate the average value per ton, and, if so, state the average value per ton, if you know, in the north and south levels of the main shaft, each respectively?

A. As regards the ore, I have panned quite a lot of it—prospected it, and I claim to be very good on what ore runs; and if I would state, which I will,

1156 Walter Smith.

what I think the value of the ore in that mine per ton I would say $21 a ton, taking the ore as it is sent up.

Q. Was the work done at the mine below the surface under this management, in your opinion, as an experienced miner, that is, was it done in a cleanly and economical manner, or otherwise, if you know?

A. What work that was done was done as it ought to be, yes, sir. I mean the development work. There wasn't enough of it done; what was
1157 done developed ore in good big quantities. Parts of it was very rich; parts of it was as rich ore as I ever seen in the mine, and the ore I saw would average seven or eight hundred dollars to the ton—parts of it out of the old winze that was sunk; I saw a handful of it panned (grabbed a handful) and there was something like $10 in it; that is the only one place that I speak of being as exceedingly rich as that, but the other ore was fair average ore; what I saw was easy estimated at $10 a ton—that is the way they sent it up, waste and ore mixed; clean ore would amount to $15 or $20.

Q. How much, in your opinion as an experienced
1158 miner, would it take to put that mine into proper and workmanlike condition, in order to successfully operate the same?

A. Well, I should say it would take—give me plenty of room—$15,000 to sink a new working shaft perpendicular five or six hundred feet deep, which would tap the lode probably 400 feet deeper than it is tapped, and run levels as you saw fit.

Q. If such work was done what then, in your opinion, based upon your experienced knowledge and observation as a miner, would that mine be worth?

A. If the ore continued in bodies as it continued for the first five hundred feet, the mine would probably be worth double the amount that it ever

1159

was—I had estimated it would be easy enough price, and if it was mine, I wouldn't take half a million for it.

Cross-examination:

Q. What kind of ground is it that you were working in, dangerous or otherwise?

A. In places it is dangerous; would be dangerous for some men; not very for me, because I use all the timber that is necessary.

Q. Mr. Smith, are you mining where you are, or are you just gouging it out in the pay streaks? 1160

A. I am mining in better shape than the company was. We are developing what ore we take out and are finding it ourselves.

Q. Now, where you are mining, don't you just have it so small you have to crawl in and get out your ore in a candle-box?

A. In one place I took out 25 or 30 candle-boxes of ore, in order to keeping from cleaning out old drifts and getting it out otherwise.

Q. If the company were working that it would be necessary to clean it out and timber it at considerable expense, wouldn't it, Mr. Smith, to cut this one particular place? 1161

A. Yes.

Q. In most of the places is it not ground that has to be timbered?

A. Yes, sir; we timber it.

Q. Do you not send any waste out through the shaft hoisting it up?

A. We have not sent but six or eight loads since we started to leasing; we store it away in the old stopes.

Q. Mr. Langford, who testified this morning, is your partner, is he not?

A. Yes, sir; George Langford.

Q. You testified, Mr. Smith, that the amount

of bullion you got out last was 17 or 18 days' work, did you mean for one man?

A. No, No.

Q. What did you mean?

A. I meant for five men; I stated that we made on an estimate eight or nine and a-half dollars clear, above all expenses, for each of the three parties interested.

I have never had any experience in assaying.

Q. Can a miner, no matter how experienced he is or how intelligent he may be, tell from looking at the
1163 ore what its probable value would be per ton?

A. No, sir.

Q. Upon what, then, did you base your average of $21 a ton for all the ore in the mine, in your answer to Mr. McIntyre?

A. By sampling with the pan. I have sampled some of the poorest and some of the best. I made this estimate in this way: by sampling this poor ore where the ledge was small and sampling this rich ore where the ledge was rich; in places it would average $100 and probably more in some places, and I thought I left plenty leeway when I made the estimate at $21.

I made these samples at different times; probably
1164 35 or 40 samples; when I was working for the company I made that many; and afterwards 125 or 150; I averaged probably five samples a day; the three partners of us generally averaged 12 or 15 samples a day when we were leasing.

Q. And from these samples you base your estimate?

A. Yes, sir; and samples I see others panning.

Q. You testified that you saw ore that would run, under the Willson management, seven or eight hundred dollars a ton, how much such ore was there?

A. Well, quite a quantity. The place where I

saw was about four feet wide, the ledge; I don't know how long it continued that way.

Q. Can you give any estimate of the number of tons that there would be of that ore?

A. No, sir; I can't see into the ground any further than you can see in that stove. It might not have been one ton. Possibly not; it is more probable there would be several hundred tons.

Q. You said that you thought the other ore would run from eight to ten dollars, wouldn't there be more that would run eight dollars than over that?

A. No; I think that there would be more that would 1166
run over ten dollars than eight dollars—a great deal more; eight dollars is the very lowest that I ever thought the ore could run, and badly mixed up with waste ore when it run that low, judging from the way the lessees' ore turned out; our ore is averaging over $20 right along.

Q. Your ore is very clean, is it not?

A. Exceedingly so; it is as clean as we can take it out and make headway.

Q. If your ore, very clean, only averages $20 a ton, how could you expect all the ore in the mine to average $21?

A. Of course, we are working on ore that has
been condemned—the refuse of all other workings. 1167

Q. Did you ever boss a gold mine—ever foreman?

A. Yes, sir; in Calaveras County.

Redirect examination:

Q. When you stated, in answer to Judge Crowe, that you made eight or nine dollars per day, and that you paid your two men three dollars per day, were the wages of these two men at three dollars a day included in your expenses?

A. Yes, sir.

Q. In all gold mines does, or does not, the quality of the ore as to richness vary?

1168 Frank L. Bates.

A. Yes, sir. The Good Hope Mine is no exception to this general rule; it doesn't vary any more than others and not as much as some that I have seen.

Recross-examination:

Q. You may make that $8 or $9 during the remainder of your lease or make less?

A. I expect to make more—a great deal more; we have more ore in sight than we ever had at any one time.

1169

FRANK L. BATES, by deposition given in November, 1895, on behalf of the defendant, testified as follows:

I reside at Good Hope Mine and have since last March; my business is gold and silver mining and milling. I have been a miner about 18 years and have worked in gold mines the last six years. I have worked in the Good Hope Mine since last April; I was laid off two or three weeks, I think. I was working in the mine. Mr. Willson was
1170 manager of the mine when I first commenced. I knew the condition of the mine in its interior workings at the time I commenced working there. It was in a good condition then at that time. When I ceased working the mine commenced caving in. It was not properly timbered. This was under Willson's management. Just these levels com menced coming in which were not properly timbered. The timbering was neglected—that is, the timbering will decay in two years.

Q. Was the work done under Willson's management economical or extravagant?

A. Well, it was done carelessly; his foreman didn't attend to things, that is all; his foreman let the men do about as they pleased, that is the way it

was. The foreman didn't come down but once or twice a day; it seemed as if he didn't care for it, and the men didn't care either. That was the general condition of things during the Willson management. Since I have been there he had in his employ underground between 40 or 50 men, some were not experienced.

Q. Did you or did you not ever hear the miners themselves discuss the management and operation of the mine?

A. Yes, sir. That the mine was run loose. I heard this every day or two—most every shift. I am leasing at the south end of the mine now. Since the 6th of September, 1895, I got a three months' lease, and the lease—the place I am working is old workings—supposed to be abandoned by the company. We put the car tracks in; they were there before, but I took them out for the company. I took them out for the company, and then after we started leasing we had to have rails, and I was sent to attend to it and put them in. That portion of the mine when I commenced working was in bad condition; the level had all come in; we couldn't get in; the only way to get in our place was up a chute; had to crawl up a chute to get in. We have received returns from the first shipment. In our workings in the mine under this lease. Well, the first shipment we estimated was about a month, $1,165. Eighty tons—supposed to be. Just about half dead work was done during that time; retimbering, catching up old drifts, cleaning up and getting ready; getting in condition to work; retimbering is the principal thing.

The ore in that mine averages per ton $14.50 now if I recollect; it might be a little off. We shipped, but have not received any returns yet. The estimate is $1,250—most $20 per ton. An experienced miner can break in that mine per day on an average of five or six tons a day; other places he can't

1174 James R. Cheatham.

break so much. An average miner can break about three skips—about 3,600 pounds. I worked about a mill, I think, six years steady. I am a practical mill man.

Q. What, in your opinion, if that amount of money, $20,000, was expended in the development of the mine would it then be worth?

A. Between three or four hundred thousand dollars any way.

This is the best gold mine I was ever in. I have worked in mines. The company could have operated those abandoned workings more economically than we could.

1175

Defendant's counsel proposed to read the deposition of an architect, as to the way in which the chimneys were built in the house at the mine. At the suggestion of plaintiff's counsel the defendant's counsel states that the substance of the deposition is that the chimneys do not communicate at all; that there are two separate flues.

1176

JAMES R. CHEATHAM, recalled on behalf of the defendant.

By Mr. Wetmore:

Q. In relation to the cars that were used in November, 1893, and the cars that are now at the mill, and that were there in December, 1893, how is it in regard to the skips being the same or different?

A. The skips were the same. The car that they are using now up on top is not the same; the car that we used was on the dump. That is the one Mr. Goldsworthy saw.

William T. Smith. 1177

WILLIAM T. SMITH, sworn and examined as a witness for the defendant:

By Mr. Wetmore:

I live at Los Angeles, California. My profession is mining expert, chemist and metallurgist. I have been in California seven or eight years. Prior to that time I was in business on my own account as a smelter or refiner of gold or silver for 18 years, in Providence, Rhode Island. I was sole proprietor of the William T. Smith Works. 1178

I have experted for pay, within the last year, seven mines in California, and I have also examined probably a dozen more on my own account. That is exclusive of the Good Hope Mine that I have experted. I have been through the Good Hope Mine; I am familiar with mines of that character. I have made a thorough examination of the Good Hope Mine. Our work on the ground commenced, I think, the 5th of November, and we finished it the 28th of December, 1895, and I afterwards made one more trip, occupying about three days, to see what developments had been made in the meantime. Mr. John Goldsworthy was my companion in making that examination. I was 1179 employed by Mr. McIntyre to go and examine the mine. Prior to that time I had never heard of the parties to this suit. Altogether I devoted to the examination about 40 days; I could not say certainly, but about 40 days.

By Mr. Wetmore:

Q. Won't you tell the jury briefly what you did; what method you pursued in making the examination of that mine?

A. We first took surveys on the surface; Mr. Goldsworthy is a surveyor; I am not. With his

instruments he took surface surveys to find the lay of the land, or the mine. Then we measured down each of the shafts, starting at the surface, with a steel tape measure, taking the measurements from the surface to the bottom of the first level that went off from the shaft; and then measured down to the next level and so on until we reached to the bottom of the shaft. We also measured the levels or drifts from the shaft, and noted on our books the distance of the first chute that we arrived at, in which the ore was put down, and the first man-
1181 hole, and in going along we noticed the distance of every chute, one from another, and also from the shaft, giving correct measurements of the entire length of every drift or level. We also took rough diagrams or drawings of the ground that we went over. Then we would measure the width of the vein. Where there was a long vein we tried to take it once in fifty feet, usually opposite the chutes, and were always careful to be conservative in taking our measurements. We measured width with a steel foot rule, and noted the width on our books, and we usually took a sample, although we took lots of measurements where we did not take
1182 samples. When we took a sample it was generally done with a pick clear across the vein, so as to show the actual average of the vein. The broken quartz was usually knocked down on to a bag or piece of canvas, and we would roll that and mix it up thoroughly and quarter it, the same as we would cut a pie, and take the two opposite quarters for our samples. These samples were put into new bags bought for the purpose. Every sample was numbered consecutively from No. 1, and we also entered on our note-book, from whence the sample was taken, its number and the width of the vein. I have a table of the samples.

Q. Can you give that to me?

A. Yes, sir (handing a paper to Mr. Wetmore).

1183

This is the table of the location, showing the exact spot from which every sample was taken. We made a working map of the mine. Mr. Goldsworthy brought it with him. I don't know where it is. This is a blue print copy of our working map (witness showing a blue print). Every place where we took a sample is marked on this map, with the exception of three samples taken from the winze at the extremity of the lower end of the old south shaft; through some accident they were left off, and on our blue print we had put them on with lead pencil. We took 212 samples affecting the value of the vein of the mine. We also took other samples that 1184
did not affect the value of the mine; that is, battery samples. Our battery samples did not really affect the value of the mine. We took samples of tailings and other things. We took 212 samples for the purpose of testing the average value of the orein the mine. Upon this blue print map these little figures that appear all over are the places where we took the samples.

Defendant's counsel offers in evidence the table referred to and it is marked Defendant's Exhibit H.

1185

These samples were assayed.

Q. Did you or Mr. Goldsworthy conduct the assaying?

A. We did; that is, I did not do it entirely. My partner in business, John J. Lonergan, made all the assays and then I verified them, taking every tenth assay. He has given a sworn affidavit. Mr. Goldsworthy examined the assays. This is the table, and our report of the assay of each sample, corresponding by number, the value of each sample. Those assays are absolutely correct as far as it is possible for any man to make them. They show 209 assays. Then there were three in the supplemental report that I made afterwards. The whole here

amounts to 210 then, throwing out two high assays. They correspond with the samples. The 210, throwing out the highest, average $16.06 per ton, and including the high ones, average $22.51; but three others were taken in the supplemental report. Those two samples did not properly belong there.

We found one in the waste in a stope, an underhand stope on the second level. There had been a stope carried down about 15 feet which we had heard was very rich, and we hunted through the waste; this stope hole had been filled up with waste
1187 and we hunted through the waste to see if we could get any samples there of ore, and we found quite a number of them and they were of high average. We also took samples of the waste itself and found it run $7 a ton. Then we scraped the stulls opposite where the ore had been blown up by the force of the powder, and those run $31 a ton, which would show there must be very rich ore there.

Those two particular samples, 124 and 125, run $270 a ton and $1,153.33 a ton. Those not being chipped directly out of the vein, we made the calculation excluding and including them. I remember my estimate of the ore still remaining by blocks on our working map. Block No. 1, the average
1188 thickness of the vein 1.17 feet. Contents in ton, $3,325.40.

Block No. 2, average width of the vein, 1.34 feet; number of tons, 109.95. Block 3, average width of the vein, 1.78 feet; contents in tons, 537.12. Block 4, average width of the vein, 1.19 feet; contents in tons, 4,671.02. Block 5, average thickness of vein, 1.37 feet; contents in tons, 191.49. Block 6, average thickness of vein, 1.5 feet; contents in tons, 1,179.1. Block 7, average thickness of vein, 1.75 feet; contents in tons, 2,331.35. Block 8, average width of vein, 1.34 feet; contents in tons, 2,117.28. Block 9, average width of vein, 1.31; contents in tons, 9,665.99. Block 10, average width of vein, 1.53;

contents in tons, 2,073.41. Total contents of the ten blocks, 26,203.1 tons. That figures, taking an average of $16 a ton, $419,249.60. That includes everything above the lower level, except on the south of the south shaft, I figured nothing, although there is ore there for 42 feet up to the dyke. We took the average of the whole mine. We allowed for surface displacements in figuring there; we allowed ten feet to figure the surface as entirely level, although it was not necessary. The ore was found cropping out along the surface within two or three feet of the surface, and in some places a foot above the surface. We provided for the inequalities by 1190
averaging the width of the vein and then knocked ten feet off afterwards. This is the original of the map from which the blue print was shown. This map has the blocks marked and numbered on it to which I have referred. The light color on the map indicates the excavation.

By Mr. Wetmore:

Q. Taking the ore, measuring along the lower level and then measuring in depth, how deep down do you measure to calculate this, down below the lower level, as ore in sight? 1191

A. 31½ down to 500 feet along the level. That shaft or winze goes 31½ feet down. Taking that, it figures 2,073.04 tons. That would be called ore in sight, at $16, would be $33,218, leaving off the fractions. In the course of our examination of the mine we made mill runs; we stayed continuously at the 20 stamp mill and we run through four different lots of ore. The 20 stamp mill is divided into four batteries of five stamps. It is very different from the Bryan mill. The Bryan mill has rollers and the stamp drops—crushes.

The mine was then in the possession of the Court at this time. We had an order from the Superior

Court to make a mill run or test. The Court gave the order to the deputy receiver and he said that the mill had been closed down for two days but was ready to start up the next morning.

We served the order on the afternoon or evening of December 2d, which was Monday and Tuesday morning, December 3d, he put us in possession of the mill, and we had brought our own mill man with us, and allowed no one else in the mill while we were making our run. They had been running through the mill for several days a lot of ore be-
1193 longing to the lessees, Messrs. Murray & Happe. There were four batteries, numbered 1, 2, 3 and 4. The Murray & Happe ore was run through the further one, the number 4 battery. At number 3 battery there was some ore that we had a complete mill test of; we started it ourselves and finished it up. That was Smith, Bates & Langford's ore, at battery number 3. At battery number 2 there was ore from the mine furnished by the receiver and going to the receiver's account. We had considerable difficulty when we arrived in finding proper tools to have the mill run smoothly and nicely as it should and it probably took a couple
1194 of hours to pick up what tools we needed. After that we paid attention to the ore and we found by taking a couple of shovels full from the bins feeding batteries 1 and 2, that instead of being ore it was about nine-tenths waste; the sample we took was nine-tenths waste and not over one-tenth ore. That was furnished by the receiver. There was nine-tenths of granite. The samples that we took out I think would average not over one-eighth of it ore at first. We hardly thought we were given a fair deal.

We got an order from the Court to mine our own ore, for ourselves. We finished up the Murray & Happe ore. The lessees made the clean-ups themselves under the supervision of a man, I believe,

by the name of Parish, appointed by Mr. Boicourt, and, of course, Mr. Goldsworthy and I overlooked the clean-up to see that there was not anything lost or wasted. In the same way with Smith, Bates & Langford's ore, and also with the receiver's ore which we were running through batteries 1 and 2. The ore that we mined ourselves was mined from the same stopes where Mr. Boicourt was taking his, and mined by the same men who were taking out his ore. Although I think I might state that after we had served the order that we were going to mine our own ore, that the ore 1196
that was coming into the company's bins was very much more like ours than that which he had been receiving previously. To determine whether it was or not we closed up our battery sample at half past ten, on the night, I think, of December 4th, but still continuing on the same run, and then made a new sample which showed, after assaying, that we were getting better ore. Those were the four mill-runs. We took notes of them and can give a table that will show the result of each run. The net results of the Smith, Bates & Langford ore was $481.51, furnished to Mr. Boicourt. I took the bullion after it was retorted and went to the 1197
express office with it. Mr. Boicourt did it up in a bag and sewed it up and sealed it and I went to the express office and delivered it to the Wells Fargo Express Company and it went to the mine. These figures are from the mint returns. That was from 37 tons; making an average value per ton of $12.97. That is the Smith, Bates & Langford ore alone. The net returns from 72 tons of ore belonging to Murray & Happe, as received from the United States Mint, show $1,727.16; an average value per ton of $23.98. The Murray & Happe ore had been part of it run through before we arrived, but we completed the run and the entire clean-up was made while we were there.

1198 The ore that went into the mill-run was in the bins when we arrived there. The ore bins are up above the mill and the ore comes down by gravity. While we were making the mill run it was being continuously hoisted also. That particular ore that I am speaking about I saw with my own eyes. I saw that ore go through the mill. I did not see all of the Murray & Happe. I saw all the rest of it, every pound. I saw ore in the bins, a part of the ore was brought up under my supervision. The one that I have just been reading was made
1199 up both of ore in the bins and ore that was hoisted afterwards from the mine. The net returns of the Murray & Happe ore, received from the United States Mint, was $1,728.17; average value per ton, $23.98. The net returns from the ore mined and milled of Messrs. Smith, Bates & Langford—mined as well as milled—under the Court's order, was $519.82; being the proceeds from 42 tons, having an average value of $12.37 per ton. The net results from 54 tons belonging to the company, mined under orders of Mr. Boicourt, was milled by Smith & Goldsworthy, as received from the mint amounted to $125.14, being an average
1200 value of $2.31 per ton. That which I have called the Receiver's ore was mined and run by us.

By Mr. Wetmore:

Q. What directions did you give under the Court's order?

A. I gave directions to bring up samples of ore from the different stopes and pan them in my presence. I gave the directions to Mr. Cheatham so that I could get an idea of how the ore was averaging; and my orders were to him to get a good ore; not to hunt for rich ore, but to make a good average run of the ore. We found ore in the A level south that was very rich and we took

very little of it. We found ore in the winze that ran about $5—that is, by prospecting it with a pan, and I told him to take from those four places and make about an average run of it.

Q. How did you get at the tonnage?

A. The skips—I didn't weigh it for the reason that there were no scales there to weigh it with. I figured two skip loads to a ton, the same as has been done there by everybody.

Q. What is the cubic contents of a skip?

A. 16 cubic feet. The average from the three runs, Smith, Bates & Langford, Murray & Happe, 1202
and the Court's order, was $18.06 per ton. The average counting the Receiver's ore is $13.91 a ton.

Q. I don't know whether I correctly understood you—how many skips to a ton?

A. Two skips to a ton.

Q. Is that right? I understood you to say that there were 16 cubic feet to the skip.

A. Yes, sir; 16 cubic feet of broken ore.

Q. Assuming that the mine in 1893 had been developed, beginning with the sinking of the shaft in 1890, was there anything unusual or improper in the driving of the shaft and levels of that mine as they are represented upon that model, for that length of 1203
time?

A. I don't see how you could make a mine without doing it.

Q. How is it in respect to being the usual way in which a mine would or would not be opened under those circumstances?

A. If a man has got a little capital, and can afford to develop, that is the proper way to do; but all men have not got capital to afford to do it, and they have to take out the ore to pay their running expenses.

Q. Suppose that an expert, acquainted with the mining business, going through that mine should

1204 William T. Smith.

find there 120 feet, which you see represented upon that first level, stulled and lagged; what would an expert, performing his duty, do under those circumstances as to counting it or not counting it?

A. If there were no man-ways or chutes to indicate that the ore above it had been worked, it is a pretty good indication that the ground is barren or heavy, and he would take down some of the stulls and find out the condition of it.

Q. From what you have seen of the mine from your examination, and from the parts left, assum-
1205 ing that it was, substantially, that first level, as shown on the map, with the veins coming out in the levels, and in the shaft, and in the stopes, was there any difficulty in ascertaining the average width of the vein in that mine?

A. None whatever.

Q. Do you know any way in which, if the stopes were worked along the vein as it lay, those stopes could have been worked so as to materially alter that average width of the pay streak?

A. It would leave a very scalloped stope, on the face of the ore. It would be a suspicious object for an expert. It would create a suspicion in the ex-
1206 pert's mind if it was stoped in a ragged way.

Q. Assume that the bottom of the lower level to the north end that there was a pile of waste as you see represented there, and that just behind the pile of waste the drift had run off the track, run off into the country eighty feet, the vein split, and that they were working the pay streak 20 feet up in the vein, at that up-raise, could such a condition of affairs as that have misled any well-informed expert as to the condition of the vein or the value of the mine—arising from that circumstance as it there appeared. You may take this—that there was waste, and it was known that the level extended out beyond, but it was not known how far, and as matter of fact it was off the vein; and that

1207

it appeared from the face of the up-raise that it was 21 feet up?

A. I should most certainly have had the waste removed.

Q. Do you remember what sort of ore there was on that side of the main shaft. I only mean generally, as to its quality and richness?

A. I could not say that I do remember. The ore all through the mine was good ore, whenever you found ore.

Q. How was that, at the end of the second level north, as to whether it was on the vein or not?

1208

A. I presume it was on the vein, or else it would not be stoped.

Q. Now, down at the south level. Assume that at the end of 250 feet from the main level there was a platform, and in front of the platform boards had been nailed up for draught or any other purpose, so that you couldn't see through there. In your judgment would any competent expert be justified in drawing any conclusion from that, or what he should do under those circumstances?

A. He should find out what was behind those boards. I have gone along that level. It runs south of the shaft, I believe, 143 feet. It is south- 1209
west, the general course is. It goes in straight for 30 or 40 feet, and then it comes back and they drove off to the west, and continued south.

Q. That is what is known as a dyke?

A. Yes, sir. The foot wall is pretty hard. The hanging wall is not quite so hard.

Q. Are there any surface indications right above there of the existence of that dyke?

A. Yes, sir. What we call nigger-heads. Little sort of boulders lying around on the surface, and an indication that a mining man knows when he sees it, without knowing why he knows it. That would indicate that there was a dyke below there

which went down some distance. It would have a good deal of influence with a man that is doing his duty. He would want to know how far that dyke was going to run, how long it would take to get through it, and how much the ore was that was displaced.

By the Court:

Q. What is a dike, it is not a vein?

A. It is not a vein. It is a large body of stone, of any kind, that pushes in at right angles and
1211 breaks a vein or a fissure off, or fills up a fissure.

By Mr. Wetmore:

Q. Is there ore in that level south of the south shaft?

A. Yes, sir. I think we took three or four samples out of that level. They ran about $6.70 a ton, I think; they averaged that.

Q. What are the indications beyond that, after you got over the dike, up here on the surface?

A. Why, you find the vein exposed again; that is, by cross cutting for it. You find the vein down
1212 for several hundred feet beyond. After you get past the dike you come to the surface indications of the vein. There is one shaft sunk there, and I don't know but two. They are not deep shafts—probably about 15 or 20 feet deep.

Q. And from those shafts and surface indications, can you tell whether the vein is there or not?

A. Yes, sir. It is there.

Q. What do you find the average width of the pay streak all through the mine?

A. 17.13 inches. That was the average of the ten blocks. We took measurements from two inches up to eight feet.

Q. Is there a formation in the mine which you would term kidneys?

A. No, sir; the ore is wavy—not always of the same thickness; it widens out in places; pinches in in places, and widens out again.

Q. And does it not seem to make much difference where you find a pinch; if you go down you will find it to widen out, or if you go up you will find it the same way?

A. Yes, sir; and not always at equal distances. There is no rule that you can follow to find it.

Q. According to your experience as a miner of veins of this character, suppose it had been without pinched places, and had an average uniform 1214
width, say of two feet, would that be considered to give a better promise of richness than to have the variety and size and pinched places as it is?

A. The formation of this mine is the best with the pinched veins rather than to have it uniform.

By the Court:

Q. Does the statement of the average width of the pay streak in a mine amount to anything anyway?

A. It does in figuring up how much ore you have got in your mine, and it does as regards the cost of 1215
working it. In a vein of this character an occasional horse, so-called, is generally considered a sign of richness.

I have examined the Egan report. A battery sample is a sample taken from the automatic feeder that is running into the battery. We usually take them once an hour, but half an hour would be better. Egan gives, in his report, as the assay of his battery sample, $38 a ton. I have read his letter of November 30th (being Defendant's Exhibit C), addressed to James M. Sigafus, in which he gives the assays of his samples. He speaks of his crude ore or battery samples in that letter. He says that it showed gold, 1.5. I have computed

1216 that. I make about $31, showing an error of $7 a ton. And in his 25 tons, at his rate, there would be an error in his battery samples of $175; and if it was 40 tons, $280. The value of tailings stated in his report is $7.

In his letter of November 30th he speaks of his assay of tailings, and says he thinks he has made a blunder. I have computed what the statement as to his assay of his tailings is in his letter of November 30th, and find it $57.88 instead of $7, as he states in his report. In his report he gives as the
1217 value of his retort as $724. Assuming that the truth of his testimony, that his retort was 54 ounces avoirdupois, I have computed the value of that as $674.87 instead of $724. He gives, in his report, as the average of his mine assays, leaving out the sample taken at the breast of the drift and the two high assays, $23 a ton. He gives the returns from his assays in that letter of November 30th. I have computed those assays upon the same principle, and find they are $17.44 a ton for gold, that being the value of his assays as shown by his letter, and $23 as claimed by his report.

Q. Calling your attention to the fact that Egan,
1218 in his report, claims that he makes the ore in reserve 46,922 tons, and that he figures his blocks in the first level 250 feet long south, and 517 feet plus 117 feet north, and on the second level, 250 feet south by 670 feet north, and that he found the average width 24 inches, and deducting the amount which he states, in his table of blocks that he took out for stoping, and deducting his errors of measurements, what do you find that his true ore in reserve on his own figures, is?

A. 40,068 tons.

Q. Mr. Egan has stated that the first level is 250 feet below the collar of the shaft. How low is it?

A. 236 feet, I believe.

Q. He has stated and figured that the distance

between the first level and the second level is 100 feet, how much is it?

A. 94 feet. If I remember aright there is a difference between his figures.

Q. Is it possible in that mine to make a mistake of that size if one carefully measures?

A. Not as he found the mine at the time he was experting it, because it was in a very good condition compared to what it is now.

Q. Mr. Egan has testified that he estimated the ore run through the mill three loads to the ton, and assuming that the car or skip held 16 cubic 1220
feet, and assuming that it held 13.5 cubic feet, have you computed the number of tons that ran through the mill in the 61 car loads?

A. Yes, sir. It makes 40 tons and a fraction, and at 16 cubic feet 47 tons.

Q. Dividing his retort, corrected on his figures, by 40 and by 47 tons respectively, how much did that ore run in his mill-run?

A. Between $15 and $17 a ton.

Q. Figuring his ore in reserve, corrected on his figures, by his gross value, corrected on his figures, how much do you make his gross value at his own computation?

1221

A. You mean corrected?

Q. Corrected so far as the figures are corrected.

A. $717,217.20.

Q. Assuming that Mr. Foster and Mr. Moorehead are right, and that the mine is worthless above 70 feet from the first level, on account of the widening of the fissure, and assuming that the stopes had not been raised over 35 feet at that level at the time Mr. Egan was there, were there any surface indications by which one could learn the fact of this opening of the fissure?

A. No, sir; there is none.

Q. And assuming that that 70 feet undiscover-

1222 able error is figured out, how much does that reduce Mr. Egan's figures?

A. 105,930 cubic feet divided by 12 will give you the number of tons. That is the way he figured it. The reasonable expense of mining is $2.50 a ton and 85 cents a ton for milling, making $3.35 for mining and milling. $3.35 would be the entire cost of getting it out, milling and everything.

By the Court:

Q. Could you express a judgment, taking the ore
1223 body as you saw it, as to how much it would probably cost to extract the product, going through the whole process just as it ran in the mine, per ton?

A. Yes, sir.

Q. What?

A. Just what I have said, $3.35 a ton. That is not figuring office expenses.

Q. Would you consider ore worth $5 or $6 a ton worth mining?

A. If there was a large vein of it it would be worth mining, but if it was only a small vein it would hardly pay.

1224 *By Mr. Wetmore:*

Q. How is it in respect to the gold increasing or diminishing, if there is any change in that respect, as the vein goes further down in the earth?

A. It is considered generally in California that a mine will increase the further down it goes, but that does not always prove to be the fact. In this mine, however, we found as rich ore very close down to the bottom of the level, or richer, than we did up above.

Cross-examination by Mr. Stickney:

Q. How many men of your own did you have at work there under you?

A. Two; Samuel Ferguson and E. A. Anderson. Mr. Cheatham and Mr. Watts worked under our orders while we were making our examination.

Q. How came you to employ Mr. Cheatham in your examination of this mine?

A. I was working under the direction of Mr. McIntyre, and McIntyre said that Mr. Cheatham was better acquainted with the mine than anyone, and that he would show me the points.

Q. And he did so, didn't he?

A. He did, part of the time—I guess three-fourths of the time he was not with us. 1226

Q. Who was Mr. McIntyre?

A. An attorney.

Q. Where?

A. In Riverside.

Q. Whose attorney?

A. For the defence in this case.

I never saw Mr. Sigafus until I came to New York on this trip.

Q. Do you happen to remember how many of these 212 samples are less than $3 a ton?

A. No, sir.

Q. Haven't you any recollection of that?

A. I have experted four mines since I experted that. 1227

Q. Have you any recollection how many of them ran over $20 a ton?

A. No, sir. It is immaterial to me what they ran.

Q. Then are you prepared to admit that 104 of these assays run less than $3 a ton? Will you accept that as accurate?

A. If you say so on your word I will.

Q. I do say so, subject to correction, that 104 of them are less than $3. Now, are you able to state to the jury from recollection how many of your assays, according to your own statement, figure nothing at all?

A. No, sir.

1228 William T. Smith.

Q. Would you be surprised if you found that there were 18 of those out of your 212?

A. Not at all.

Q. I read the figures of some of these assays: $110.47, $95, $63.14, $1,153.33, $270, $270, $757, $67.85, $157.03, $131.20, $57.69, $42.01, $42; are you prepared to admit that those are all separate figures of special assays in that table?

A. Yes, sir.

Q. Does it strike you now that you were rather fortunate in some of your samples?

1229 A. No, sir.

Q. Can you tell which of those Mr. Cheatham helped you to get out?

A. I don't think he helped us more than once or twice the whole time. We were there attending to our own business, and nobody had a chance to tamper with our samples.

By the Court:

Q. Experts, in examining a mine, generally select their own samples?

A. Yes, sir.

1230 Q. And do not rely upon anybody connected with the mine to do it?

A. No, sir. When we make a mill-run we have to rely upon some one's honesty, but I don't lose sight of him even then.

Q. Who was it, when you were making your mill-run, and having the ore brought up, such as was brought up for the purposes of the mill-run, to whom you gave your directions as to the selection of the ore?

A. To Mr. James Cheatham.

Q. Then was he a man as to whose thorough integrity and honesty you had already satisfied yourself?

A. I knew nothing against him in any way.

1231

Q. That is the best you can say?

A. Yes, sir.

Q. What did you know for him?

A. Nothing specially.

Q. Nothing either for or against him?

A. No, sir.

Q. How much of the ore that you ran through the mill came out of the mine under your own supervision—that you practically saw come out of the mine?

A. Thirty-four tons.

Q. And as to that you gave your directions for its selection to Mr. Cheatham?

1232

A. Yes, sir.

By the Court:

Q. The rest of the ore came up in what way?

A. In the regular course of the business of the mine—hoisted up.

Q. That is, some by the lessees?

A. Two samples of them by the lessees.

Q. And some by the receivers?

A. Yes, sir; as I understood it.

Q. The value of a mill run depends, doesn't it, on the honesty with which the ore is taken out of the mine?

1233

A. Yes, sir.

Q. And on the quantity of ore that goes through the mill?

A. Yes, sir.

Q. So, on this 30 odd tons of ore that was selected for you by Mr. Cheatham, what was the average that you got out of that?

A. $12 and something—nothing remarkable.

Q. It did not grade out as high as your samples, did it?

A. No, sir.

1234 William T. Smith.

Q. In your examination of the mine did you run across any barren spots?

A. Yes, occasionally.

Q. How often?

A. I could not state definitely.

Q. Can you state indefinitely?

A. I don't know what you mean by stating indefinitely.

Q. Take your own meaning.

A. What I mean is, I don't remember.

Q. Do not remember what you mean?

1235 A. No, sir.

Q. Won't you give to the jury, as accurately as you are able to do so, how many of those barren spots you found—how frequently you found them?

A. There is a barren spot on the first level, north, which is probably 150 or 200 feet long, but it has been stoped up above it, and it shows on our map.

Q. I am not asking you what shows on these maps; I am asking you as to the results of your personal observation. Give to the jury the most accurate statement you can of how as frequently you saw barren spots there in the mine.

A. Just as I said; I cannot remember. This isn't the only mine I have examined. I have forty

1236 mines in my head.

Q. Look at the map.

A. It doesn't show a great many barren places in looking at the map.

Q. Is it the fact, then, that you are unable to tell the jury how many barren spots, or what the frequency or extent of them were?

A. They occur occasionally, but not so often as they do in the ore, in my opinion. What I mean is, that you will find more long stretches of good pay ore than you will of barren ground.

Q. But I am asking you to give the jury the best idea you can of how frequently and how extensively you found barren spots.

A. The longest one I remember is in that north level. I should judge it was a couple of hundred feet long, but that is no indication that it is barren up above or down below.

Q. Which level are you now speaking of?

A. The first level; that is, what is called the first level on that map. (Indicating the large map.)

Q. And there was one about 200 feet long?

A. That is only a guess at it; it might not be so long.

Q. Did you find a barren spot on the second level, north? 1238

A. No, sir; not in my opinion.

Q. Did you make an examination there?

A. Yes, sir; very thorough.

Q. And you found no barren spots at that second level, north?

A. There were places where I didn't find ore on the level.

Q. But no continuous barren spots, or substantially barren spots?

A. On the level there was, but above the level there was ore.

Q. Now, at the end of the second level, south—did you find any barren space there?

A. No, sir. 1239

Q. This dike was in the second level, south?

A. That was south of the south shaft.

Q. A dike, as I understand your explanation, is a place where there is barren rock comes in and cuts across the vein so that it breaks off the vein altogether?

A. Yes, sir.

Q. And, as nearly as your observation went, at that point, for how long a space did that dike at the south end of the second level break off the vein?

A. Oh, that would only be guesswork. I will give you a guess, if you want it.

Q. You did not make any observations, then, of

1240 sufficient thoroughness to enable you to state on that point with accuracy?

A. Yes, I did; only I don't remember all the observations that we made.

Mr. Goldsworthy made the surface observation.

Q. Now, as to these samples and the assays; of them you have yourself verified only one in ten, you say?

A. That is all. Oh, I have verified more than that; but I followed that as a rule, and then I verified the high ones.

1241 Q. Then your computation of the value of the ore is based upon the results of your assays?

A. Yes, sir.

Q. And on the assumption that the entire assay all through those blocks has a value of the average of your samples that you have already given us?

A. Yes, sir.

Q. In your opinion, what is the most accurate test of the value of the ore all through a mine—the result of a year's actual operation of the mine, or 200 samples taken out of it?

A. If it is honestly and intelligently done, work in the mine would be the best.

1242 Q. As I understand you, your mill runs covered four different lots of ore. Do you make one of those lots. this lot of 34 tons, a separate lot out of the 34 tons that came up under your own supervision?

A. I gave the average of the result of one separate.

Q. That is one of the four lots, then?

A. Yes, sir.

By a Juror:

Q. I thought that run was 42 tons?

A. I might have been mistaken in reading it. (Witness refers to paper.) You are right; it says 42. You see, I don't remember all these figures.

1243

By Mr. Stickney:

Q. Am I correct in saying that the ore that came up under your supervision, and which was run through the mill, was a little over 30 tons?

A. Why, according to this, it was 12 tons over 30. If it was 34 tons, of course it would make it very much richer. My note books will show which is correct, and my letters from Mr. Boicourt. Mr. Boicourt and I agreed upon the weight, and we had no discussion at all about it.

Q. Let us see that we understand one another. What I am asking you about now is the quantity of ore that was sent up by Cheatham and that you ran through the mill; how much there was of that?

1244

A. 42 tons, according to my notes here.

Q. Let me see where your notes state that, if you please?

(Witness hands paper to Mr. Stickney.)

A. I think there is an error there, made by the stenographer, but I am not sure; I cannot keep all those things in my head, but I can go back and prove the whole business.

1245

By Mr. Wetmore:

Q. You say you think those figures "42" should be 34?

A. I think so, but am not sure. I can verify all of it. Every transaction that took place is on our books, even to the hour and minute when it took place.

By a Juror:

Q. I think some of the ten blocks, which you made a record of, vary from 100 tons to 3,000 or 2,000?

A. Yes, you will see on the map that that is occasioned by those blocks being nearly all stoped out.

Q. Some of those small blocks might be quite valuable, and some of the large ones might not be valuable?

A. Yes, sir; but the mine averages valuable all through.

Q. What I had in mind was, whether it would be fairer to take what each block averages rather than to take the $16. I should think if you took
1247 the different blocks and figured them out according to the block assays, you could determine the value a great deal closer?

A. The more assays you have from all over a mine, the better. Then you have a pretty fair idea of what there is in a mine.

Q. Which one of those blocks is the largest one as to which you have estimated the value?

A. The largest block is No. 9, containing 9,665 cubic feet.

Q. You take that a thickness of what?

A. Of the measurement taken all around that block.

Q. Give it to me in feet or inches?

1248 A. Block 9, 1.31 feet between the surface and the first level, north of the north shaft. We average the surface from the highest point to the lowest point in order to get it level, and then we allow 10 feet for surface displacement. For a length of about 500 feet laterally, and somewhere from 150 to 220 feet vertically, I have estimated that the entire block would average $16 a ton, in giving my figures. The next largest block is No. 4—4,671.

Q. State the lateral dimensions of that and the vertical dimensions?

A. 305 feet long, and vertically, 210 feet, on the average

Q. And as to that, you have assumed, for the entire distance, that it carries an average of $16 a ton?

A. Yes, sir; I did not know any other way to figure it.

Q. Suppose there was one of those 100 feet barren spots in there, it would make a little difference in the actual ore that came out?

A. Yes, sir; and the same if there were any of those places like Moorehead found, it would make a difference.

Q. Is there such a thing as salting a mine or preparing it for examination? 1250

A. Yes, sir.

Q. Did you ever have any experience in the examination of such a mine?

A. No, sir.

Q. Then such a thing is possible?

A. It might be possible with people that don't know anything about mines.

By the Court:

Q. How would it be with an experienced expert who was doing his duty?

A. I don't think they would salt very much on him—not if he was doing his duty and had trusted people. 1251

Q. Suppose the pay-streak of a mine did have a long break and long barren places; and suppose it were worked for two or three years in such a way as to leave the original ore exposed; and suppose then, if long stretches were found to be barren and were filled up—do you mean to say to the jury that it would be invariably possible for an expert to find out where those places had been filled up?

A. I don't see why he would not.

Q. He would have to dig, in many cases?

A. Why, certainly; he has to very often.

1252 *By the Court:*

Q. According to your theory, salting was more for the tenderfoot than the experienced investigator in mines?

A. When an expert goes there he goes on his honor—the same as a lawyer takes a case.

By Mr. Stickney:

Q. Lawyers differ in acuteness sometimes; do experts also?

A. I presume they do, all over the world. I
1253 never depend on any statement that is made to me if I can find out for myself, and then I don't, either.

Q. You depended upon Mr. Cheatham as to selecting your ore?

A. I told him where to select it.

Q. And then you depended upon his honesty in following your directions?

A. I could depend upon his honesty more than upon anybody else that I knew around the mine.

Q. And you did depend upon his honesty?

A. Yes, sir.

Q. And you did so because you had to?

1254 A. To a certain extent.

Q. It all comes down to about this—that, as to a mill run, as in other human affairs, at times you have to trust other people?

A. Yes, sir.

Q. You were asked by the Court one question as to the importance of the average width of the pay-streak—that the average width of the pay-streak decides several points—in the first place, the amount and quantity of ore that there is?

A. Yes, sir.

Q. And in the second place, the quality of it—that is, if the pay-streak is continuous, without any considerable breaks, of course the entire pay-

1255

streak of the vein will grade higher than if it is very much broken up; that is so, isn't it?

A. No, sir.

Q. I think we must misunderstand one another about this.

A. I don't think we do.

Q. If the pay-streak is continuous, with no breaks, isn't it the fact that the entire ore will grade higher than it will if there are very large breaks of barren stuff?

A. The ore itself won't grade higher; no, sir.

Q. But the entire pay-streak, wouldn't it?

1256

A. You have more tons. Possibly you might equalize it in that way.

Q. Then, if a pay-streak were continuous, without any breaks, it would diminish the cost of working it, wouldn't it?

A. Yes, sir.

Q. In other words, if there are long stretches of barren ground, the expense of working would be very greatly increased?

A. Yes, sir.

Redirect by Mr. Wetmore:

1257

Q. I understood you to say that the Receiver's ore that was hoisted up the latter part of the time ran at a higher grade than at first?

A. We found it did. We made separate samples. When we found the ore was coming in good we closed up our battery sample and started a new sample, and we made assays on the ore that was run through previous to the closing of the battery sample, and we found that the first ore averaged about $1 a ton and the last between $8 and $9 a ton. That was not run up by Mr. Cheatham.

Q. You stated that you had examined a number of gold mines?

A. Yes, sir.

1258 William T. Smith.

Q. Comparing this mine with mines of the same character in California, what is your opinion in respect to its being a valuable mine or otherwise?

A. From what I know in my business, it is the best mine that I know of in Southern California, and I know a great many.

Q. Why?

A. On account of the length of the vein showing on the surface, the depth of the vein, and the richness of the ore. You are down 467 feet, and you are still in good wide ore, and there is no reason
1259 why you wouldn't be in it if you went down 2,000 feet, that I know of, although it might break off.

By the Court:

Q. As mines go, give us your opinion what that mine is worth now?

A. $200,000; I mean as an investment.

Recross-examination by Mr. Stickney:

1260 Q. Your opinion of the value of this mine is based on the assumption that those two large blocks and the other blocks average $16 a ton right through, isn't it?

A. Not on those particular blocks. I take the whole mine, and the possibilities of what may be, beyond what is developed now, and what may be below.

Q. But in the whole of your testimony you have been assuming and stating under oath that those two big blocks you have estimated at $16 a ton right through?

A. Yes, sir.

JOHN GOLDSWORTHY, sworn and examined as a witness for the defendant.

By Mr. Wetmore:

My residence is Los Angeles, California. I have been living there nearly 40 years. I have had experience in mining all my life. I was brought up in the vicinity of the lead mines in Wisconsin, where my father owned mines, and he taught us about such things, and mining was talked of in our family just as matters of commerce might be talked of in a merchant's family. 1262

By the Court:

Q. You are a miner by heredity then?
A. Yes, sir, almost.

By Mr. Wetmore:

I have owned two or three gold mines, and worked them, and am familiar with the operation of gold mines and of true fissure veins, and all that. I examined this mine in connection with Mr. Smith. I should like to add that I not only am a miner by heredity, but I have been trained as thoroughly as any man could be, both as to education and practice. 1263

We proceeded to the mine and made our measurements. Wherever there was a reasonable place to take a sample that would indicate the value of the mine, we took such a sample, and we followed that up at every place in the mine wherever we could get through; in fact, there were some places where it was very difficult to get through, and dangerous both to life and limb. Our examination was made as thorough as it was possible to do it. No one dictated where the samples should be taken from. We took the samples where we thought

proper ourselves. We went over the assays and verified them. One set of samples were made in duplicate and then I had another set of samples made again in duplicate so there were quadruple samples taken, and all taken on until they agreed, and we rejected them until they did agree; so that the sampling and assaying was done as impartially and as thoroughly as anything that could be done; and the results are as tabulated by Mr. Smith.

We found a ledge, a true fissure vein, occurring in the granite formation and having a pitch run-
1265 ning nearly north and south, pitching towards the west at an angle of about sixty degrees, with several pay chutes or chimneys of ore passing through it, the chimneys of ore themselves having a trend of their own. The trend of the chimney was from the surface down, trending towards the south, at an angle of about sixty degrees, almost the same angle as the ledge. In other words, the ledge, for instance, or the vein (illustrating with a sheet of paper)—call the long way of the paper north and south; the vein pitched towards the west in this direction, and the chimneys of ore took their trend through the vein in this direction; and, as I
1266 recollect, there were three of those pay chutes or chimneys, which varied in length from 50 or 60 to 150 and even 200 feet in places. There were also barren spots there. Between the point where those chimneys would come together there would be barren spots; where those chimneys or chutes of ore would not quite come together there would be barren spots; and, as I recollect, there were three such places in the mine. South of the old south shaft there is syenite dike, or hornblende dike, passing to the south of the old south shaft, I should say, as well as I can recollect, about 40 to 43 or 44 feet south of the shaft. The dike is about from 40 to 100 feet in width as it occupies the surface of the ground crossing through the vein.

Q. How beyond where the dike crosses the vein; what is the condition of affairs beyond the dike crossing the vein?

A. The dike, be it understood, is at the southern extremity of where the vein has been worked, and is, as I say, from 50 to probably 150 feet, occupying the space where the vein was; and south of that there is again, on the course of the ledge or vein—there are indications, I should judge, from the old south shaft probably 700 feet, where the vein shows again in about the same course, with the same pitch, and about the same size and richness, and 1268 shows up for at least 100 to 150 feet.

Q. Assuming that the mine was in that condition of development in November, 1893, as shown by that model, would there be any difficulty in any expert going through that first level, if he did his duty, in ascertaining the barren spots, or in ascertaining the character of the ground behind where it was stulled and lagged, assuming that it was stulled and lagged, for 120 feet?

A. I cannot conceive any difficulty.

Q. And if he did not go behind that or know what there was behind, what do you say in reference to his being justified in counting that in as 1269 ore?

A. If he counted it in he counted it in at his own cost. He certainly has facilities for getting in there and seeing what it was, and he was not attending to his business if he did not do it.

Q. After your examination of that vein and pay streak, assuming that the levels and the shaft were open substantially as shown there, and they stoped and stopped where it showed the pay streak—let it be stoped to show the pay streak, and when he found the pay streak was broad stop—would that condition of affairs, in your judgment, deceive any competent expert as to the average width of the pay streak, to be taken from his own measurements?

A. I don't see how it could. The condition of the mine is such I don't see how it would be possible to deceive any one in regard to it.

Q. Then, at the end of the lower level to the north, assuming that it is as put there on the model, that the drift had run off the vein there, and there was a pile of waste; should that condition of affairs have caused any embarrassment in the mind of a competent expert examining the mine to ascertain that fact?

A. No, sir.

1271 Q. Assuming that at the other end of the south level, at the bottom of the shaft, there was a winze and a platform, and it was boarded up; would any competent expert, in your opinion, have any difficulty in ascertaining what was behind there, in the construction of that mine as it then existed?

A. No, sir; that particular point was called to my attention when I was in the mine and I made an examination of it with that object in view. This is the south end of the mine (indicating), and the place where the platform is shown there is the place. I remember the platform was there and I was going down into the winze. I remember distinctly going down into that winze, and I took hold
1272 of the platform in this way (illustrating) and sort of swung myself under it to catch the ladder that was going down into the winze below. There was a ladder in the platform where that point is marked. We made a practical test of mining and milling and we found that we could mine and mill the ore for $3.35 a ton on an average. The mill runs were made under my supervision. The table correctly expresses the result. I went down with Mr. Cheatham and directed him where to mine this ore. Of course we had to be one at one shift in the mill and the other at the other, and during my time off I went down in the mine with Cheatham and directed him in five different places where to take

ore out of the mine, places that I thought would be average samples of ore, and Mr. Cheatham worked under my direction and took the ore out.

Q. There in the model is the mine represented as it was in November, 1893, and taking Mr. Egan's figures of the stope, taking out an average of 20 feet high of the stope, counting 100 and odd feet. You made this working map?

A. Yes, sir.

Q. And taking your estimate of the value of the ore as it has been left and as you examined it, what, in your opinion, was the fair value of that mine in 1274 November and December, 1893.

The Court: I think it would be a good deal wiser to ask him what, in his opinion, the property is worth now.

Mr. Wetmore: I am going to do both.

A. Figuring it on our basis of to-day and taking the number of tons of ore that we find still existing in the mine, we find that there are 26,203 tons still in the mine; and in our assays we found, by counting our high assays, it would go to over $22. We rejected those very high assays. We took $16, and taking that number of tons figured at $16 we 1275 would have $419,249.60.

Now, I have estimated that there would be a loss say of ten per cent., that is, that the ore could not be worked up to within ten per cent. of the assay value. I think that is a very fair amount to cut off on both sides, conservative. I would cut off for that $41,924, and then taking the cost, at our cost $3.35, it would be $87,780, and substracting that from the original amount would leave the value of the ore in sight in the mine to-day $289,545. And in addition to that, considering the amount of ore that was in sight at the time of Mr. Egan's taking possession, and taking into account that there are 600 acres of land that is worth at least, I should

1276 John Goldsworthy.

judge, $15 an acre, that would be about $9,000; a very good house that has cost not less than $4,000, and a number of dwellings for the men, probably at least 25 houses for the men to board in or sleep in, men that were employed at the mine; and taking into account that there are other small veins in the mine; also taking into account that the annex, which is an extension of this mine and belongs to the same property, and shows up as I have described south of the dike, I think $400,000 would be a very conservative price for that mine at that
1277 time.

Q. And at the present day, as that mine stands to day?

A. At the present day, according to my figures, I find that the mine ought to be worth $289,545.

Q. As an investment?

A. Yes, sir.

By the Court:

Q. What would you call its market value?

A. It is one of the very best mines in Southern California and it ought to be worth that to-day, its
1278 market value. Of course men in making a trade would shade it somewhat, but that is a very valuable property, properly worked. You can ruin anything by mismanagement.

Cross-examination by Mr. Stickney:

I figure the ore in the mine as being worth $289,000 clear profit to the miner after it has been taken out of the mine.

Q. And that is figuring the cost of getting out at a fraction over $3 a ton?

A. $3.35.

Q. Now, the value of the property, of the buildings, and of the property outside of the mineral,

will depend, will it, entirely upon whether or not that mine can be worked at a profit; that is so, is it not?

A. I did not quite catch your question.

Q. The value of the property outside of the mineral, outside of the ore, the value of the buildings, and everything else there in and around the property, would depend on whether or not the mining property can be worked at a profit, is not that so?

A. You refer to the value of the land and houses?

Q. Yes; the value of the buildings, all of the property that you have described. 1280

A. The land is an excellent farm.

Q. I think you intend to answer my question fairly.

A. Yes, I do; I say the land is an excellent farm, and is valuable outside of any mine or anything else; and the house is an excellent farm-house, and can be utilized on the farm.

Q. But the property is a mining property, is it not, and that is the way we are looking at it and estimating it, and that is the way it is bought, and you propose to sell it so, if you sell it, don't you?

A. Yes; but it has a good market value outside of the mine. 1281

Q. But as a mining property. Now, your estimate, your figure of that ore in sight, goes on the valuation of $16 a ton, does it not?

A. Yes, sir.

Q. And that $16 a ton is the value put on it right straight through, is it not?

A. Yes, sir.

By the Court;

Q. Do you believe that to be correct?

A. That is the result of our assays. I believe that to be correct.

1282 John Goldsworthy.

By Mr. Stickney:

Q. That assumption is at the bottom of your entire figuring?

A. Yes, sir

Q. That is the foundation of the whole of it?

A. Yes, sir.

Q. And then your entire figuring goes on the fact that this block No. 9 is solid, as Mr. Smith represented it and assumed it?

A. Yes, sir.

Q. And that this other block No. 4 is solid with
1283 ore of that value right straight through, at $16 a ton?

A. Yes, sir.

Q. $16 a ton right straight through?

A. Yes, sir.

Q. Without any break at all; that is the way you figure it?

A. Yes, sir.

Q. You get your estimated value of $16 and odd a ton from those precise samples that Mr. Smith has testified to, don't you?

A. Yes, sir.

Q. With those precise figures?

1284 A. Yes, sir.

Q. And you assume that those are fair samples representing the fair average value throughout that entire mine. You assume that as the basis of your calculation, don't you?

A. That is right.

Q. And if that is not the fact then your calculation falls to the ground to that extent, does it not?

A. It is a fact.

Q. That is what you think?

The Court: Of course it falls to the ground.

The Witness: Yes.

Q. Give me that admission and that ends it. And

then, to make it perfectly clear, you assume, as I understand Mr. Smith to assume, that block No. 9 and block No. 4 is perfectly continuous, as a perfectly continuous pay streak of that average width of 18 inches, right straight through, the whole breadth and height?

A. We did not make it 18; a little over 17.

Q. Between 17 and 18 inches?

A. 17 inches and about one eighth.

Q. In examining a mine, and statements are made to you, in writing, as to the average value of the ore that has actually been taken out in the op- 1286
erations of a period of more than a year, do you give no weight whatever to those statements in any case?

A. I would not do anything toward investing in a mine, or letting my friends invest in a mine, in any way, shape or form, unless I had experted it myself, and I would think more of my own experting than I would of everything else put together.

Q. Do you say to the jury that you would give no weight whatever to the statements that were made to you, with details and figures as to what had been the actual results of the mining operations for a long period of time; would you give it no weight 1287
whatever?

A. I would not give it any weight any more than it might induce me to make the examination, and after I had made the examination I would not care anything about it.

Q. And if your examination agreed with it would you then give it any weight?

A. It would be a satisfaction to know that I agreed with somebody else.

Q. Suppose you went into the mine there and found levels and drifts of 3,000 feet and upward where the pay streak was exposed to view, and then suppose you take samples from all through that

1288 John Goldsworthy.

mine and find it runs $23 or $24, do you give any weight to that fact?

A. That is just what I would give weight to, if I understand your question.

Q. You found yourself barren spots there, didn't you?

A. Yes, sir.

Q. By chimneys, I understand you mean continuous bodies of rather rich ore, is that it?

A. Yes, sir. There may possibly be a little place between the edge of one and the edge of another,
1289 where it is not so rich. Those chimneys occurred all through this mine, as far as my observation went.

Q. They might be one on top of the other?

A. I suppose such a state of things might exist; I don't think they do in this mine. The breaks between the chimneys were mostly between the ends.

Q. One witness here said this one was in pockets; is that so, according to your operations?

A. If you consider one of those chimneys a pocket you might call it so, but it would be a very extensive pocket. I would not. We would call it a chimney, in that case, a shoot of ore.

Q. Down in that mine, at a depth of 380 feet, it
1290 is pretty dark without a light, is it not—perfectly dark?

A. Yes, sir.

Q. Black darkness?

A. Yes, sir.

Q. And you go down there and make your examination with candles in your hands, don't you?

A. Yes, sir.

Q. And it is possible, of course, to fill up places that had formerly been excavated in mining operations?

A. Yes, sir.

Q. When you are down there there is a greater or less quantity of waste, is there not, that has

been accumulated during the mining operations; there is always more or less waste, isn't there?

A. There is always more or less waste in the stopes. There is not a great deal of waste in the levels; you have to have the levels clear to work there.

Q. It is, of course, a perfectly possible thing to fill up either a winze or the end of a shaft or the end of a level; it is possible to fill it up where the mining operations have been carried on beyond a certain point?

A. I can answer part of that question. You can fill up a winze and you can wall up the end of a tunnel. And you could cover planking or anything of that sort with ore and debris.

Q. Do you mean to say that in an examination of a mine, which has to be made with a candle in your hand, if this filling up has been done, and if a very skilfull attempt had been made to conceal it—do you mean to say that you would be absolutely certain in all cases of detecting that attempt? Would there be no possibility whatever of your being deceived on such a point?

A. I think I would hardly be likely to be deceived. I see most everything there is in a mine when I go into it.

Q. You think so?

A. I know I do. I would not believe a single thing until I had verified it, no, sir—if it was my brother or my father.

Q. If you have verified a large number of the statements that are made to you, and have found them, as you believed, to be entirely accurate, would you then refuse to believe any statement whatever that was made to you by the same parties?

A. I would not tell those parties that they lied, I don't think. I would not be influenced by their statement in my purchase of the mine. Is that

1294 John Goldsworthy.

what you mean—if I was going to purchase the mine.

Q. I cannot do anything but put my questions.

A. Then I would have to say that I would not take any stock at all in the statement.

Q. Have you ever known a case where an expert had examined the mine—leave this one out of consideration for the present—where an expert has been deceived?

A. I don't recollect a case just at present; no, sir. I don't think of one.

1295 Q. And when you speak in your computation of the value of this mine, of your rejecting your highest assays, you mean, as Mr. Smith did, that you rejected the three very highest; that is what you mean, is it not?

A. If I recollect right those were the ones.

By a Juror:

Q. I think some of the witnesses stated that those that were working under leases—that the milling cost $3 a ton. You stated, I think, that milling and mining and everything would cost $3.35?

1296 A. Yes, sir.

After it is mined and brought to the mill, then 85 cents will pay the expense of putting a ton of ore through a stamp mill.

Q. Those who were working under leases got their milling done for $3 a ton?

A. Yes, sir.

Q. They paid that for it?

A. Yes, sir.

Q. You and Mr. Smith say that milling and mining and everything would be $3.35?

A. Yes, sir.

Q. Mr. Smith said, I think, that mining alone would be $2.50?

A. Yes, sir.

Q. Leaving 85 cents only for milling and other things?

A. Yes, sir.

Q. How do you reconcile that 85 cents with the $3 that was paid by the other people?

A. The parties who own the mill and are doing the milling for those miners make the difference in profit?

By Mr. Wetmore:

Q. Is there more than one mill there? 1298

A. No, sir.

Q. They must have it milled in that mill or not have it milled at all?

A. There is only one mill in that neighborhood. There is a profit of $2.15 on that milling according to these calculations.

Q. Wont you kindly give the particulars of how you make the 85 cents, or whatever it may be, as cost of milling. How did you arrive at it? What did you allow?

A. The milling consists of paying the wages of one amalgamator, the wages of one engine man, one man who drives the engines or who attends to the engine, who attends it for the mill and for the 1299 mine; and then there is the cost of the coal and of the quicksilver and two men, one man in the night and one man in the day; and the wages of all these people are figured up and the cost necessary to run the mill in that country--we are close to coal, and fuel is comparatively but a little object. It reduces itself down to about 85 cents a ton. We figure wear and tear in that 85 cents. That covers everything.

1300 Frank T. Smith.

John Wilford.

FRANK T. SMITH, recalled on behalf of the defendant.

The Witness: I made the statement that we figured two skip loads to a ton. I was mistaken about that. I think we figured 1,200 pounds to each skip load, with the exception that there was a car on the first level that only held about three-quarters as much as the ordinary cars on the other levels, and those were figured up at 900 pounds
1301 each, but I inadvertently made that statement. If I used two skip loads, it would take 2,400 pounds to a ton; but the way we figured it, if I remember right, I think was to multiply 1,200 by the number of skip loads and then divide it by 2,000.

Defendant's counsel offers in evidence a paper showing a computation of ore in reserve, etc., marked defendant's Exhibit J.

Smith and Goldsworthy's maps—the models—also received in evidence as defendant's exhibits.

Defendant rests.

1302 ——

The plaintiff read the cross-examination of John Wilford, a witness whose deposition was taken by the defendant on the first day of November, 1895, but was not offered by the defendant, said cross-examination being in part as follows:

(Counsel hands witness a paper.)

Q. That is your signature, is it not?

A. Yes, sir.

Q. And that paper contains a statement that you made to Mr. Jones, does it not?

A. I believe it does; that is my signature.

Q. In that statement are these words: "In my opinion the mine averaged about $10 a ton."

A. I think I said $10 or $12. I said probably ten or twelve dollars, as he asked me my opinion.

Q. Where were you working during the mill run, Mr. Wilford?

A. I was working on the old second north in near the face.

Q. What kind of ore were you in then, good ore?

A. Yes, in very good ore.

Q. Better than the average ore; could you see some free gold in it?

1304

A. Yes, sir.

Q. How much do you suppose that ore averaged; as much as thirty dollars?

A. Yes, I believe it did.

Q. In this statement, which you have looked at, you say, "I was driving ahead in the ore; Cheatham came and took me back in the stope and said, 'take it out there in the five places along the same stope'"; is that correct?

A. That is correct.

Q. That was good ore, was it?

A. Yes sir; good ore.

Q. That is the ore you testified to Mr. McIntyre, that was taken out, that you did not see run 1305 through the mill, but was taken and sent up in the skip?

A. Yes, sir.

Q. In the statement you say, "I took ore, as he told me, in five different places, three or four tons; it was ore that would run $25 or $30 a ton;" is that correct?

A. I told him it was my opinion it would run that; it was good ore.

Q. You remember the second level north; did you ever work in that?

A. Yes, sir; that is the one we are speaking about.

1306 John Wilford.

Q. In this statement you say, "Trimble ran in 75 or 80 feet, then came back and started up a raise and let the dirt fill it up enough to hide it;" is that true?

A. Yes, sir.

Q, That is the drift, 75 or 80 feet?

A. It was run back 75 or 80 feet.

Q. And it filled up to hide that 75 or 80 feet?

A. Yes, sir; they seem to have got off the vein.

Q. Now you testified to Mr. McIntyre you were working there when Griffith, Egan and Cheatham
1307 came in to the drift, did you not?

A. Yes, sir.

Q. Was that Cheatham the Cheatham who was the mine boss?

A. Yes, sir.

Q. That Mr. Cheatham is still working for Sigafus, is he not?

A. At the present time?

Q. Yes, sir.

A. I could not say.

Q. Is he not getting witnesses for this case?

A. I could not say positive that he is; I got a subpœna from Mr. Johnson.

Q. Has he spoken to you about your testimony
1308 to day?

A. Has he spoken to me?

Q. Yes; didn't you have a long conversation with him this morning?

A. Not very long; perhaps ten or fifteen minutes.

Q. Has Cheatham not talked with you about what you would testify in this case, frequently?

A. No, sir.

Q. Has he never come to see you?

A. No, sir; to-day was the first time he spoke about anything.

Q. In this statement you said, "That I was working right at the end where it was filled in putting in the chutes, and Griffith, Egan and Cheat-

ham came into the drift; I heard Cheatham say this is the end of the work." Is that correct?

A. Yes, sir.

Q. He said that to Griffith and Egan?

A. Yes, sir.

WILLIAM H. GRIFFITH, recalled on behalf of the plaintiffs.

By Mr. Stickney: 1310

Q. Did Mr. Sigafus make it a condition with you that you should not use the Burnham report?

A. No such talk as that ever took place between us. I simply told Mr. Sigafus that I wanted a copy of the Burnham report, and asked him if he could get me one, and he said he thought he could. He mailed it to me.

Q. Was the Luckhardt report mentioned between you?

A. Not at that time.

Q. When was it that it was?

A. The Luckhardt report was mentioned the day he gave me the bond, on the 5th of July. 1311

Q. Did he ever intimate to you, in any way or form, that the Burnham report was not to be used?

A. No, never at any time.

Q. What did he hand it to you for?

A. He mailed it to me. I received it by mail.

Cross-examination by Mr. Wetmore:

I received it by mail in either Chicago or Mercer. I am not certain which. Early in October. I received no map with it. I asked if he could send me a map with the report at the time.

Q. You had, at that time, a written agreement with Maxwell, by which he was to have one-half

1312 Boyd B. Jones.

of any commission on a sale from Mr. Sigafus to you, and you were to have a one-half share with him of any commission that you got?

A. I had no contract with Mr. Maxwell.

Q. Hadn't you such a contract previous to that?

A. On the first bond; but it distinctly stated that fact. I drew a draft on Maxwell as late as November.

Mr. Stickney: We put in evidence a schedule which our opponents have handed to us of the bullion receipts, which foot up, three
1313 of them, for the year 1890, $2,979.89; for the entire year 1891, $12,784.05; for the entire year 1892, $25,680.56; and for the entire year 1893, $20,288.16. This is their statement. We do not concede it to be accurate. Of course, the learned counsel intend it to be so. But this is all that they claim to have been shown by the Mint returns.

Marked plaintiffs' Exhibit 35.

Plaintiffs' counsel offers in evidence a paper purporting to be an agreement, signed by Sigafus, Bird and Maxwell.

Objected to as immaterial and irrelevant,
1314 not in rebuttal, and having no bearing upon the present controversy; objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted.

Marked plaintiffs' Exhibit 36.

BOYD B. JONES, sworn and examined as a witness for the plaintiffs.

By Mr. Stickney:

I live at Haverhill, Mass. I am a lawyer. I have acted for these plaintiffs in different matters

connected with this mine from the beginning to the end. I saw Mr. Cheatham at the time he made his statement; that statement, the body of it, is in my handwriting. I asked him questions and he answered them. After the main body of the statement had been made it was read to him. He asked to have some corrections made; they were made. After they had been made he signed his name at the end of the second portion, and he put his initials at the end of the first. I heard his testimony as to the presence and use of whiskey, beer and ale. It is absolutely false. There was no beer in 1315 1316
the house and no ale in the house. There was a little whiskey in a flask of my own, which I took with me when I left Haverhill, and some of it was there when I returned. There was not a drop of either used in that house that evening. I want to go a little further. There was in that house some claret. They don't use water in California, or rather in that part of California; they haven't any that is fit to use. Claret is drank as water is drank. I don't recollect whether he had any or not that evening; but there was no one there who drank any claret to excess, and I would as soon have thought of anyone drinking water to excess as anyone drinking claret to excess that evening. 1317

Cross examination by Mr. Wetmore:

That house was the property of the Good Hope Mining Company—the one that has been referred to as being occupied by Sigafus and by Doran. Mr. Wilson was occupying it generally, and Mr. Egan and myself were there that evening. I got at that house, I think, the 15th day of April. I left California about the 27th of the same month.

Q. You said that you were certain that there was nothing in that house.

A. If I said so I misexpressed myself. So far as

1318 Anderson C. Moorhead.

I know there was nothing in that house, and I think I should have known it. Col. Egan was there, in and out all the time, and I think in the room all the time.

Q. Were the other parties in and out.

A. Mr. Wilson, I think, was there all the time.

Q. You cannot swear that nobody went out and took a drink, can you?

A. I don't know about that. My best recollection is that nobody went out and took a drink. That is, however, the best of my recollection. I
1319 am certain there was not any drinking there, anything except claret, and of that I have no recollection, one way or the other.

ANDERSON C. MOORHEAD, recalled by plaintiffs.

By Mr. Stickney:

I call your attention to what has been stated by Mr. Smith and Mr. Goldsworthy to be the working map. In December last, and since then, have you
1320 repeatedly been through the whole of that portion of the mine?

A. I have.

Q. Have you examined, also, the blue print map which shows the spots from which Mr. Smith and Mr. Goldsworthy said they took their samples?

A. I have.

Q. How many samples do you find have been taken from block No. 1 and from the smaller block which purports to have 210 tons of ore in it?

A. 28 samples.

Q. How many were taken from block No. 9, which, as they state, represent 9,673 tons?

A. 16 samples.

Q. What is the total tonnage of block No. 1 and

of that smaller block from which they took the 28 samples?

A. 3,536 tons.

Q. In block No. 4, which, according to their map, contains 4,697 tons, how many samples were taken?

A. 20 samples.

Q. Did you see Mr. Smith there?

A. Yes, sir; in November and December.

Q. Are you acquainted with the condition of the mine at that time?

A. I am. Block No. 1 was practically all worked out, with the exception of the ground *here;* but the 1322
Receiver has worked that out since. The lessees worked some ground out *here*, near the old shaft. No. 4 is the ground which my partner and I leased, part of the ground, together with part of block No. 9. This ground had been worked out above the A level, and shows no ore going down except at *these* points. There is no ore going up. The B level was worked out as far as the ore went in *that* direction, with the exception of a small bunch of ore *here*, which is not considered very much. In the old first level of the ground my partner and I had a lease, and it is all worked out practically to *this* point *here*. That is where we got the most of our ore. *Those* two stopes were carried 1323
together, and the ore laid out going up in *that* direction since this map was made. We also crossed *that* shaft between blocks 9 and 4, and followed the ore in the foot wall, and the hanging wall vein had about two or three tons of ore in it, which we took out since December.

Q. In block 9 how many tons of ore do you say there were in reserve in December, 1895?

A. Probably 200 or 300 tons, all told.

Q. Do I understand that you worked out block No. 4 yourself?

A. Yes, sir; with the exception of the ore *here*, about 15 feet in length on the hanging wall vein.

1324 Anderson C. Moorhead.

The vein splits there, and there is ore on the foot wall and ore on the hanging wall. We worked out all the ore from the foot and part of the ore out of the hanging, except we left a body of ore about 15 feet long and 14 inches thick. Back *here* on the foot wall there was a body of ore about 60 feet long and about 12 inches thick, and it would go from $2 to $3 a ton. The body of ore that we left *here* would go about $5 or $6.

Q. Now, about the land there at the mine, the 600 acres of farming land that has been spoken of,
1325 what is the quality of it as farming land?

A. It is considered very poor farming land. It is covered with rock, and there is no water on it—nothing but sage-brush and boulders.

Q. Has a crop of any kind ever been raised on it?

A. Not to my knowledge.

Q. Can a crop be raised on it without irrigation?

A. There might be one year in five or six or ten, a wet year, on a small portion of it.

Q. Did you find it possible to hear between the two rooms in the house?

A. Yes, sir; I heard very easily, with my ear two or three feet from the chimney, conversations at
1326 an ordinary tone of voice, I should think.

Q. Did you make other tests of one kind and another?

A. Afterwards. At the time I speak of I was in the room above and Mr. Wilson was underneath. He afterwards went to the room above and I stayed below, and he poured water down the chimney, showing that the flues connected; they connected about two feet above the fireplace in the upper room.

Q. Did you cut the wall open in the Sigafus house to see whether those flues connected or not?

A. I saw where it was cut open for the purpose of that examination.

Cross examinatiou by Mr. Johnson:

Q. How many tons of ore did you take out in this block that you were working in?

A. About 100 tons.

Q. How many days' work did your miners do in that block?

A. I am not able to say now. We worked also in block No. 9, and the time was not kept.

Q. Can you give any approximation to the correct number of days that your miners worked in block No. 4?

A. I don't know that I could. We worked there 1328
for five months, and probably nine-tenths of the time we worked in block No. 4, and the other one-tenth in block No. 9.

Q. You only had four men all told?

A. No; we didn't have so many as that; I made a mistake in my statement the other day about the number of men we had employed there. As I was working part of the time for the Receiver, running the mill, and my partner did not pay as much out for hired labor as I did, therefore I overestimated the amount of labor that we had. We did not have over three men on the average, and we worked five months; it is about 150 days; 1329
that would be 450 days' work.

Q. If a vein was ten inches wide, how much ore could a man break?

A. In that mine he could probably break, and keep everything up, about half a ton a day.

Q. How big a space in superficial area did your breaking cover in block No. 4?

A. The foot-wall vein, I think, was about 35 feet in length and 25 feet in height. Those two stopes that you see marked separately *there* were afterwards connected—the two fan-shaped things. Those are where the greater part of our ore was taken out.

1330 Q. And that space there is where you got the tons of what you say was very rich ore?

A. Yes, sir.

Q. You did not have a chance to cover this whole ground *here*, did you?

A. We prospected all along the whole of the ground to find good ore.

Q. You didn't mine it out?

A. We did five or six different points along there. We mined out as many as five different places along there.

1331 Q. But you mined out where the stopes showed or the levels or the cross-cuts showed in the mine; you didn't dive into the middle of the block overhead, did you?

A. We followed the streaks of ore as well as we could. They were divided. One was on the foot-wall and one was on the hanging.

Q. Did you make a survey of this ground?

A. No, sir.

Q. Did you measure the lengths of these levels?

A. No, sir.

Q. Did you ever measure the heights of the stopes?

A. I have.

1332 Q. Where?

A. I have measured the heights of that No. 4. I have measured some of that ground. No, that is not the block—I mean block No. 9.

Q. How many measurements did you make in block No. 9?

A. I think I measured about two chutes and a man-way, I think.

Q. What is the result of those measurements?

A. In the neighborhood of 70 feet at the first man way north, and 80 feet at No. 12 chute.

Q. If this map showed the same measurements, then, in so far as those two measurements are concerned, it is correct?

A. Oh, I presume it is correct.

Q. You have no doubt that it is correct, have you?

A. No, sir; I have found nothing to lead me to think that the measurements on the map are not correct.

Q. How many assays did you make of samples that you took out of the mine?

A. For myself as a lessee?

Q. How many assays of which you kept a record?

A. The result was turned over to Mr. Boicourt 1334
when I made assays for him and for myself. I don't think I had any use for them only after a day or two.

Q. How many did you take.

A. Perhaps 200.

Q. Where did you take them?

A. I have taken them from that block 9 north. Mr. Boicourt had leased some ground to Keogh and Jones, and they broke down the rock in the north of it, right *there*, and it didn't satisfy them to pay for milling, and Mr. Boicourt had me to make some assays, to see if it would pay for him to grind it out and mill it. That assay assayed something less than $1, and I took it from samples 1335
all around under the pile of broken ore that was lying in the drift.

Q. You first commenced assaying at what time?

A. I think it was in August, 1895.

Q. That was about six months ago?

A. Yes.

Q. And that comprises your experience in sampling and experting mines?

A. No, sir; it does not. For two years I ran an assay office in Los Angeles for custom work. I also have often sampled mines, and been with parties that have done it.

ISAAC N. BOICOURT, recalled by plaintiffs.

By Mr. Stickney:

Q. You were present when Mr. Smith and Mr. Goldsworthy made their examination of the mine?

A. Yes, sir.

Q. As to block No. 1, in which they showed that 3,535 tons are in reserve, what are the facts as to the ore in reserve there in December as to quality and quantity?

1337 A. Where that little level runs up near the surface to the south there were a few tons in there, going up and down. That was in sight—just a few little patches over on the south side, where the lessees were working; that might be called ore in sight.

Q. Did you notice on their map how many samples they took from that particular block?

A. Yes, sir.

Q. How many?

A. Twenty-eight.

Q. In block No. 4, where they say there were 4,697 tons in reserve in December last, what is the

1338 fact as to the amount and the quality of the ore then in reserve in that block?

A. I had on the A level, which is the upper one, a little ore in sight. Moorhead and Nolan had some down where they were working. Up in the stope on the old first level there were very little bunches and patches of ore along on that level. There was a little ore going down from A along for a space of 40 or 50 feet. There was no ore showing on the shaft on either end to amount to anything. Practically there was just in sight what I had exposed on the A level, and those bunches up in the stopes on the old first level—a few hundred tons of ore. The ore in the A level was worth $5 or $6 a ton. Down where Messrs. Moorhead and Nolan were

the ore in those little kidneys there had a value of $30 or $40. Above where the first level is the walls go apart 25 or 30 feet, and the ore goes in little stringers and bunches and kidneys, where it is utterly imposible to get it out without enormous expense and the ore is of very low grade. On the B level there were two or three stringers of ore that I stoped up in there, and then quit because the ore was so low grade, and because it was difficult, dangerous and expensive work. In block No. 9, along the upper part of the stopes there was here and there little bunches of ore, and then there would be 1340
25 or 30 or 40 feet of barren ground, and then again a little bunch of ore would come in. Whenever they would come to a bunch of ore they would measure it and leave all the ground between which was barren. Then down on the level further north, where there has been no stoping done, there were patches and bunches of ore of an exceedingly low grade. I panned and assayed them all through and found nothing of any value to count as milling ore, running from $1.50 to $2 or $3 or $4 a ton. But there is considerable of that low grade ore north of where anything has been stoped out—up in the old stopes *there*. I don't know how they got in there, 1341
because I was not able to get in there myself. Once in a while you could get up a chute and make a measurement there. For instance, chutes 11 and 13, there are measurements there. All in between *there* there are no measurements. That ground is impossible to get into. I never was able to do so. It caved and was very dangerous, and it was practically worked out. There is no ore shows on the surface, except at one spot. There is no ore in the gasoline shaft, except that little spot that was worked out on *that* side; but a little nearer to the surface *there*, I afterwards took out four or five tons there. On the north end there is no ore going down or exposed. There may be, and possibly is,

a good many tons of ore in there; but practically there is no ore in sight, except that along the first level which I speak of in bunches, in some places 15 or 20 inches in thickness, of that very low grade ore. I know the country there very thoroughly, it has value whatever as farming land, nothing grows on it but sage brush and horned toads; once in a few years, however, they might raise a crop of barley for hay.

Cross-examination by Mr. Johnson:

1343 Q. You are familiar with the very fertile country around Riverside, are you not?

A. Yes, sir.

Q. Is not irrigation used there?

A. Yes, sir—that is, 3,000 feet lower down than this.

Q. But it is the irrigation that makes the Riverside country fertile?

A. Yes, sir; it takes water to irrigate it.

Q. Large fortunes are made there around Riverside raising fruits?

A. Yes, sir.

Q. Your experience is no different than you have
1344 testified on your first examination, is it?

A. No, sir.

Q. And any expressions of opinion that you have made are founded upon no greater experience than you have testified to?

A. No, sir.

Q. Do you mean to say that you examined and found no ore down *there?*

A. I cannot see into the earth there any more than any other man.

Q. And you did not understand that the experts who testified yesterday claimed that they had, did you?

A. An expert is supposed to surround his body of

ore with his measurements and developments, so as to demonstrate by them. He is not supposed to take ore as ore in reserve or ore in sight—anything that is not surrounded with exposed ore.

Q. Are Col. Egan's blocks north of the main shaft surrounded on four sides?

A. Not with exposed ore.

Q. So that that entire block, bounded on the upper side by the first level, and on the north by the main shaft, should be stricken out of his calculation, shouldn't it?

A. Not entirely, because there was ore exposed on the A level—on the first level in those stopes. 1346

Q At the time that Col. Egan made his examination should not the entire ore in reserve that he figured north of the main shaft be stricken out?

A. Except what the first level would demonstrate.

Q. Then it is not necessary to have it entirely surrounded by excavation to estimate ore in reserve?

A. It is to estimate that the entire block is of ore.

Q. How many measurements have you taken in this ground?

A. I have taken no measurements with steel or tape. 1347

Q. How many samples and assays have you made?

A. I couldn't tell you. I have had a great many made.

Q. Have you a record of them here?

A. No, sir.

Q. It was under your management, wasn't it, that they ran a drift up *here* in that same block?

A. I ran a drift up on a spur there which looked very much more promising than the true vein. It was a talc seam, the largest one I ever saw.

Q. How much did it assay?

A. I never assay talc.

1348 Isaac N. Boicourt.

Q. How far did you run on that level before you stopped with that spur?

A. I think 90 feet. There was no ore.

Q. Do blocks 1, 4 and 9 on this working map cover blocks 1, 2 and 3 on Col. Egan's map?

A. Yes, sir; practically, except that 9 on that map (Egan's map) extends a little further north than it does on that map (the working map) in order to take in more recent developments.

Q. Can you point out any measurements on this working map that are incorrect?

1349 A. No, sir; I paid no attention to the measurements.

Testimony closed.

Mr. Wetmore: I move to strike out the testimony of the witness Olcott, on the ground that it affords no criterion to go to the jury, and that upon his own statement, in answer to the hypothetical question put to him, the data would not permit of an accurate answer.

1350 I wish to save my rights there, so I make that motion now.

Motion denied; to which ruling of the Court the defendant, by his counsel, then and there duly excepted.

Mr. Wetmore: Also to save my rights, I move now, at the conclusion of the evidence, to dismiss the complaint upon the separate grounds already stated, and each and every of them, to wit:

1. That the cause of action set forth in the complaint has not been proved in favor of each, or either, or any, of the plaintiffs.

2. That there is no proof sufficient to go to the jury that Mr. Griffith was in any way the agent of the defendant for the purpose of making the sale, but that it clearly appears that the relation was that of vendor and vendee; that the plaintiffs' sole contract, which was under seal, was with Griffith. 1351

3. That at the time of Col. Egan's visit to the mine there was no relation existing, or intended, between the plaintiffs, Porter, Hobson and Morse, and the defendant Sigafus; that there is no evidence that at that time the plaintiffs, or either or any of them, had ever heard of Sigafus or of the Good Hope Mine. 1352

4. That there is no evidence sufficient to go to the jury that the document which has been called the "Burnham Report" was the one to which Mr. Sigafus referred, and to which Col. Egan referred, both intending the same thing. Any document of that name that has appeared in the case in their relations has not been identified; that there was no relation between the plaintiff Morse and Col. Egan at the time of Egan's examination of the mine that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan. 1353

5. That there is no evidence that the plaintiffs in this case, or each or any of them, as set forth in the complaint, relied in any manner upon the statements which were made by Mr. Sigafus; and the motion to dismiss is (1) against the plaintiffs, Porter and Hobson; (2) against the plaintiff Morse; and (3) for the reasons already stated, against the plaintiffs, and each or either of them not named, whom these plaintiffs claim to represent.

Motion denied; to which ruling of the Court defendant, by his counsel, then and there duly excepted.

1354 The counsel for the defendant then and there, and before the charge, handed up the following requests to charge:

DEFENDANT'S REQUESTS TO CHARGE.

1. Unless the jury shall believe that Egan was deceived by the defendant, as to a material point, they shall find for the defendant.

2. That as to the north end of the second level, there is no evidence that Egan was deceived as to a
1355 material point.

3. That as to the south end of the second level, there is no evidence that Egan was deceived as to a material point.

4. That there was no obligation upon the defendant to leave any particular width of pay-streak visible, provided all that he exposed was the actual pay-streak as it existed at the exposed part.

5. That, on the evidence, the selection of three car-loads as the measure of a ton for the mill run, was Egan's act and constituted no fraud on the part of the defendant.
1356

6. That, on the evidence, the mill run consisted of not less than forty tons avoirdupois.

7. That estimates of the amount of ore in reserve or in sight, in this case, are not the subject of false representations, as they are matters of expert opinion.

8. The damages, in this case, must be limited to those suffered by the plaintiffs in this action, and cannot include damages to other subscribers to the stockholders' agreement not proved to have invested on the faith of Egan's endorsement of the Burnham report.

DAMAGES. 1357

9. If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine, when the plaintiffs bought it, must be applied in reducing or extinguishing the plaintiffs' loss.

(See Smith *v.* Bolles, 132 U. S., 129, 130.) 1358

10. In estimating the value of the mine, the jury may consider its prospective value.

The Court thereupon charged the jury as follows:

CHARGE.

WALLACE, J.—Gentlemen of the Jury: You are to be congratulated that this case, which has occupied so long a period of your time, and to which you have listened with so much patience, is now 1359 nearing its conclusion. You perhaps feel, however, that your time has not been given without profit to yourselves, and that something may have been contributed to your fund of information in respect to investments in gold mines; and it is not altogether improbable that you will carry away from this trial some recollections and impressions which may be useful in some future day to deter you from the temptations of such investments.

On December 18, 1893, the plaintiffs made a contract with one Griffith to purchase the Good Hope Mine; we will call it by that name, although that is not its complete title; and subsequently that con-

1360 tract was consummated and they acquired the title. Griffith, it seems, had at the time and previously for some considerable period an option for the purchase of the property, the contract which has been spoken of as a bond; and he had been furnished with a report in respect to the property, known in the evidence as the "Burnham Report"; and he had brought this report to the attention of Morse and Egan, and either Griffith and Morse, or Morse alone, I do not remember which, employed Egan to visit the mine for the purpose of making an investigation, and in order to see whether the statements made in the Burnham report were authentic and
1361 could be corroborated. In November, November 16th, I think, Eagan arrived at the mine. He remained there several days, and upon his return came with Morse and Griffith to New York. Morse interested some gentlemen in Haverhill, his co-plaintiffs, and some others, to take up the affair. Egan was introduced to them, and the report made by Burnham was furnished to them, as was also a report made by Egan himself. Shortly afterwards they entered into the contract of which I spoke, by which they agreed to purchase the property of Griffith for $400,000. After the purchase was consummated the plaintiffs organized a corporation,
1362 took possession of the property, and operated it until some time in the spring of 1895. March, 1895, as I remember it, when, the affairs of the corporation having proved unsuccessful, a receiver took possession. The plaintiffs have brought this action, claiming that they were induced to make the purchase by the fraudulent representations and practices of the defendant.

The legal theory of the case is this: The plaintiffs claim that they were induced to make the purchase in consequence of false representations made to and fraudulent devices practiced on Egan by the defendant, while Egan was making the examination of the property, whereby Egan was led to believe the Burnham report to be true, and other facts to

be true afterwards incorporated into a report made 1363
by himself; that the defendant practiced these frauds on Egan, knowing him to be acting in the interest of prospective purchasers, and expecting that he might mislead them by giving them incorrect information contained in the Burnham report and his own report about the property; that Egan did give the erroneous information to the plaintiffs; did corroborate to them the statements in the Burnham report, and that the plaintiffs, relying upon the truth of the various facts stated in that report and in Egan's report, purchased the property. If the jury find this theory to be established by the evidence, the defendant is responsible to the 1364
same extent that he would be if he had personally misrepresented the facts to the plaintiffs and personally misled them by fraudulent practices.

The action is founded upon the law of fraud, as that law appertains to the relation of vendor and purchaser; and I shall briefly state to you the principles of the law which control that relation and which are to be applied by you to the evidence in this case.

Fraud vitiates all contracts—contracts between vendors and purchasers, as well as contracts of every other nature. The fraud most generally asserted, as between vendor and purchaser, is mis- 1365
representation in respect to facts affecting the value of property. To enable a purchaser to recover of a vendor because of fraudulent statements or concealments—because concealment is fraud, as well as positive misstatements—respecting the property purchased, the purchaser must prove the statements or concealments to have been knowingly made by the vendor and in respect to material matters. If the fraud be such that had it not been practiced the transaction would not have been consummated it is material; but if it appear probable that the transaction would have been completed if the fraud had not been practiced, then it cannot be treated as material. So bear in mind, as

applicable to this case, that it is incumbent upon the plaintiffs to establish, first, that the defendant has been the author of fraudulent representations or fraudulent concealments in respect to material matters affecting the value of the property.

Another proposition of law is this: The purchaser must make it appear that it was the fraud which induced the contract, and that but for it the purchase would not have been made. So in this case the plaintiffs must satisfy you that they were misled to their prejudice by the particular misrepresentations or the particular concealments attributed to the defendant, and that it was because of the influence of those representations or concealments, in part at least, that they were induced to purchase.

Another proposition of law is to be borne in mind, and that is that misrepresentation, however false it may be, however fraudulent it may be, is innocuous, and does not furnish the foundation of an action, unless it refers to some existing fact. Whatever a vendor may say as matter of opinion, matter of judgment, is quite immaterial. The purchaser has no right to rely upon expressions of opinion or of judgment. He has a right to rely, however, upon statements of facts, not facts as to the future, but existing facts—facts which bear upon the present or the past history or condition of the property and are material, in the sense which I have explained.

And there is another proposition of law which it is necessary you should understand. It is the duty of a purchaser to use his eyes and his ears and the other faculties with which the Creator has endowed him, and he cannot complain of any deception or misrepresentation as to things which are perfectly open and obvious. But if he is misled; if by the arts or the frauds of the seller he is induced to relax his vigilance; if he is induced to trust to representations which he might have verified if he had chosen, but which he did not care to verify, believ-

ing the truth of the representations, then, notwith- 1369
standing he might have discovered the truth, it is no defense for the fraudulent seller to say that he ought not to have been deceived.

Now, gentlemen, this being an action of fraud, the burden of proof is upon the plaintiffs. Fraud is not to be presumed, it is not to be guessed at, it is not to be surmised; it must be established, and the defendant who is charged with it is entitled to the reasonable presumption of innocence until the presumption is changed by the evidence which has been produced. And yet fraud cannot be proved generally by direct evidence. In the majority of cases perhaps it is proved by circumstantial evi- 1370
dence. Fraud consists in acts and in intent. The acts are capable of direct proof; the intent can only be inferred from the circumstances of the case.

Now, gentlemen, as applicable to the facts in this particular case I instruct you that if the defendant authorized Griffith or Egan to use the Burnham report for the purpose of influencing prospective purchasers to buy the property, and they did use it, and the plaintiffs were induced by the belief in the truth of the facts therein stated to make the purchase, and the statements were false, and known to be so by the defendant when he authorized the report to be used, then the plaintiffs are entitled to 1371
recover. But you will probably find it difficult to believe that business men like the plaintiffs would have been induced by that report to buy a gold mine, a report made by a stranger, not dated, and to which even the signature was not attached. And I notice that the counsel for the plaintiffs has conceded, what has seemed to me very evident throughout the case, that it is not to be supposed that these plaintiffs would have invested their money upon the faith of the Burnham report alone. So, if you do not believe that they were influenced by that Burnham report alone, but conclude that they were influenced by Egan's corroboration of that report, and by his own report, then the im-

portant question is whether Egan was deceived and misled by the defendant, and whether he fraudulently represented to him the facts stated in the two reports. If he was deceived and the plaintiffs, relying upon those facts, upon the truth of the statements contained in those reports invested their money; if the frauds have been established, and if you find that the defendant was the author of them, then the plaintiffs are entitled to recover. It is not necessary for me to say that you must find affirmatively that Egan was deceived, at the very threshold of your consideration of the case. If he was not, that is the end of the case. If Egan deceived himself, or if Egan misrepresented the facts of his own volition, the defendant is not responsible, and never mind how much the plaintiffs may have been misled they have no cause of action. And now, was Egan misled? I shall not deem it necessary to review the evidence in this case in any detail. It has been very fully presented in the arguments of counsel, sufficiently so, at least, and it has been very fairly and very candidly presented; therefore it is not my duty, as unfortunately it often is, to attempt to correct any misapprehension which may have been created by the presentation of the facts.

You may find that Egan started to the mine for the purpose of buying it; or that when he reached it and saw it he conceived the idea that it was the basis of a great speculation, out of which he could make money for himself. You may find, in view of some of the letters that were written by him, almost at the threshold of his examination, that he did not care very much whether the facts which had been stated in the Burnham report were true or not. You may find that he was thrown off his guard by the artifices which the defendant and Cheatham resorted to, and that he was led to believe what was stated to be true in the Burnham report and the report which he made himself. Now this is a question for you to determine. Was he cheated or was he the cheat? You will remember that although

he wrote to Morse that he was making an "exhaustive" examination of the mine, and although, 1375
in his report, he stated it to be the result of a "thorough" examination of the mine, in his testimony, by deposition, he says that in the time he was there he could not make a thorough examination, but contented himself with verifying the main features of the Burnham report. I will leave this issue in the case without further remark, except perhaps to say, what it seems to me must be pretty obvious—I do not, however, wish you to be controlled or influenced by my opinion—that an expert like Egan could hardly have been misled as to the general geological and physical conditions of the mine. It is hardly probable, hardly possible. The 1376
grave question is whether he was misled as to certain particulars, and his judgment so far influenced thereby that he was led to take a very exaggerated view of the value of the property. I shall content myself with directing your attention to some of the principal matters in respect to which it is said he was deceived.

In the first place, it is said that he was deceived as to the average width of the pay streak, and that this was affected in part by the way the mine had been manipulated. It is said that he was deceived in respect to abandoned workings, and if he had discovered them, or they had been revealed, he 1377
would not have been induced to recommend the mine. It is said that he was deceived in regard to the amount of ore which had been produced, and the value of the ore in the past history of the mine. It is said that he was deceived as to the true value of the ore by a fraudulent mill run practiced upon him. And there are other matters in regard to which it is alleged he was deceived, outside of those which I may term the general geological conditions. Now, you will take up the evidence as to these various issues, consider them one by one, and determine whether, as to that one, there was misrepresentation or there was a fraud of any kind for

1378 which the defendant is responsible. Now, if Egan was deceived in some respects, but not in others, the question will arise to what extent the defendant is responsible to the plaintiffs, bearing in mind the proposition which I have stated before, that the defendant is not responsible for any misrepresentations made by Egan to the plaintiffs, except those which he authorized or of which he was the author.

I had intended to comment somewhat upon the evidence bearing upon the alleged false representations, and the devices practiced upon Egan; but I believe that my duty in this case can be properly discharged without doing so. I think I can trust
1379 to the intelligence of this jury to resolve those questions sensibly and intelligently. If you find that Egan was deceived, and that, in consequence of the deceits practiced upon him, the plaintiffs were induced to make this purchase, that they were misled by the things which misled him, then you reach the question of damages.

The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented. You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the extent that the plaintiffs
1380 have been injured by one of several misrepresentations, they are entitled to recover for that; that is, if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs.

Now, upon what particular facts stated in the Burnham report, or in the report made by Egan himself, did the plaintiffs rely. Which of those has been proved to be a misstatement for which the defendant is responsible? You can consider the statements separately or collectively. If you find that they relied upon all of them and would not have been induced to enter into the contract except for their belief in the truth of all of them, then you can say, if you find that they are entitled to re-

cover, that they should recover the difference be- 1381
tween the value of the property as it would have been if all those representations had been true and as it proved to be. On the other hand, if you say that they did not rely upon all these representations, that it was this one or that one which may have been influential, then you are to determine how much the property would have been worth if that particular representation had been true. If that particular fact had existed as represented, and then the measure of damages would be the difference between that value and the value of the property as it proved.

With these remarks I shall submit the case to 1382
your determination. It is unnecessary for me to say that it is extremely desirable that you should be able to agree upon a verdict, if you can reach a conscientious and intelligent one. The case has occupied a great deal of our time. It has been an expensive litigation undoubtedly to the parties concerned in it, and it would be a great misfortune to have a mis-trial resulting from the inability of the jury to agree. But after all the important thing is to find correctly.

Mr. Wetmore: I only wish to call your Honor's attention—you probably have examined my requests—to one of the requests to charge, in relation 1383
to this recovery being for the plaintiffs alone; that no damage could be recovered except for these individual plaintiffs.

The Court: I decline that.

Mr. Wetmore: Likewise, your Honor will allow me to note my exception to the rule of damages as laid down.

The Court: Certainly.

Mr. Wetmore: Likewise, before the jury go out the defendant excepts to that portion of the charge which states that there is any evidence that the plaintiffs relied on the Burnham report except as endorsed by Egan. I understood your Honor to

1384 put an alternative, and I will save my exception also to that.

Counsel for defendant then and there, and before the jury retired to consider their verdict, requested the Court to charge the jury especially, separately, each of the following propositions:

"The damages in this case must be limited to those suffered by the plaintiffs in this action, and cannot include damages to other subscribers to the stockholders' agreement not proved to have invested on the faith of Egan's endorsement of the Burnham report. No damages can be recovered except for these individual plaintiffs."

1385 "If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine when plaintiffs bought it must be applied in reducing and extinguishing the plaintiffs' loss."

The Court, thereupon, refused to charge each and every of the above requests, to which rulings of the Court counsel for defendant, then and there, and before said jury retired, duly excepted.

1386 Thereupon, and before the jury retired to consider their verdict, counsel for defendant duly excepted to that portion of the charge which states that there is any evidence that plaintiffs relied on the Burnham report, except as endorsed by Egan.

And also to the rule of damages as laid down by the Court, to wit:

"The measure of damages in actions of this nature is the difference between the value of the property as it proved to be, and as it would have been as represented. You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the extent that the plaintiffs have been injured by one or several mis-

representations they are entitled to recover for 1387
that."

Thereupon the jury retired, and returned bringing in a verdict for the plaintiffs in the sum of $330,275.

Defendant's counsel thereupon moved to set aside the verdict and for a new trial, upon the minutes, upon the exceptions taken during the trial, upon the ground that the damages are excessive, and that the verdict is contrary to the evidence and against the weight of evidence.

This motion was denied. To this ruling of the Court counsel for defendant then and there duly 1388
excepted.

The foregoing, together with the following exhibits, contains all the testimony and evidence received upon the trial.

The counsel for defendant did duly make the several objections hereinabove contained, and each and every of them, upon the grounds and for the reasons in each case hereinabove mentioned and stated, and thereupon, in each case, prayed the Court accordingly; and the Court did in each case make the several rulings thereon hereinabove 1389
stated, whereupon the counsel for the said defendant did then and there in each case and instance interpose his aforesaid objection to the ruling of the said Court, and prayed that this bill of exceptions might be sealed; and as the foregoing exceptions do not appear of record, the judge presiding at said trial has hereunto, having duly settled said bill, signed and sealed the same, this 16th day of April, 1896.

WM. J. WALLACE,
U. S. Circuit Court.

1390 NEW YORK CITY, N. Y., June 27, 1896.

To Messrs. STICKNEY, SPENCER & ORDWAY,
Attorneys for Plaintiffs.

You will please take notice that the above is the Bill of Exceptions, or Case, proposed by the defendant herein.

Yours, &c.,

NILES & JOHNSON,
Attorneys for Defendant.

1391

Plaintiffs' Exhibit C.

EGAN'S REPORT.

GEORGETOWN, COLO.,
November 29th, 1893.

C. W. MORSE, Esq.,
Haverhill, Mass.

My Dear Sir:

1392 I would premise this report by stating that my visit and thorough examination of the Good Hope property was to verify the report you submitted to me and made by Mr. Burnham, from observations running through a period of one year. I can thoroughly substantiate the statement made, except that my value of the amount of ore in reserve is somewhat less, from the fact that I took the average value per ton from the lowest record of the mine. In other cases, notably the iron ledge, considered of small value in the report, I consider a most valuable adjunct to the property.

Sincerely yours,

JOHN M. S. EGAN.

REPORT. 1393

LOCATION.

Pinacate Mining District, Riverside County, California, four miles west of Perris, on the Atchison, Topeka and Santa Fe R. R., Section 15, Township 5, south of range 4 west, San Bernardino meridian. The claims are comprised in a 600-acre section of land, owned by the Company, and are as follows:

The Good Hope,	999 x 600 ft.	U. S. Patent.
San Jacinto,	1,500 x 600 "	"
The Annex,	1,500 x 600 "	Location.
The Lumberman,	1,500 x 600 "	"

1394

The mine is situated on a slope running from one of the chain of hills that penetrate the valley, enclosed on the east and north by the San Jacinto Mountains and on the south and west by the coast range. Similar to all the large gold mines of California, it is situated on an undulating slope covered with debris to the depth of four or five feet, and the vein was discovered from following up the small ravines from the west, seeking for the source of the placer gold vein in them.

The Good Hope, San Jacinto, Annex, is a fissure vein, with about a northeast and southwest course, with a dip of 60 degrees to the northwest and width 1395 of crevice varies from 18 inches to 10 feet, but at no point shows any freezing together of the walls, so that its permanency with depth is assured.

The hanging and foot-walls are remarkably regular, and show a great deal of slickensides, and the only displacements occur in conformity with the presence of ravines running from the southwest on the surface. The ore body is remarkably large and regular, with a wave usual in fissure veins.

The walls are granite, the vein filling altered granite, streaks of quartz and talc, and the massive quartz composing the main ore body.

A dyke of porphery runs parallel with the vein

1396 on the northwest, with occasional small dykes running at right angles to the hanging wall.

The vein is fed by numerous stringers of quartz. This is notably the case at the second south level, where a junction of this kind of material assists in the formation of the rich ore body at the shaft, where an assay from a width of three feet gave 39 and 80 ounces gold to the ton.

Besides the pay-streak proper the altered granite, comprising the vein filling, carries so much free gold in its slips and seams that only the coarse material shot down in stripping the main ore body is
1397 left on the slopes—the fine waste being sent to the mill as part of the product. In fact, the waste is not sufficient to keep the stopes in good working shape without occasionally shooting into the wall for filling rock. The only debris I found in the stopes was a coarse, large rock, showing that this was a continual practice in working the mine.

Workings.

The main and available workings of the mine at present consist of the main working shaft, equipped at the surface with a good Lidgerwood hoisting engine, 40 horse power boiler, water-tanks, etc. The
1398 shaft is well timbered, has excellent skipway and skip. The greater portion of the shaft to the 250 foot level has been sunk in the hanging wall. At this point a drift has been run north 700 feet, and south 250 feet.

On the first level north, except for the last 152 feet, the whole length of the drift has been stulled and lagged over with convenient mill holes about 35 feet apart, and manways at proper distances. This level is equipped with cars, track, etc. In fact, all the work has been done in an admirable and workmanlike manner for permanency, and the cheap and facile handling of ore in the level. This general description applies to the whole mine.

South of the shaft the drift shows a length of 250 feet, when it connects with an old shaft furnishing good ventilation for the mine. 1399

One hundred feet below this level the second level has been driven north 700 feet and connected by winzes with the upper level and south 250 feet.

Below this level the shaft has been sunk 70 feet and is now used as a sump for the 16-inch Knowles pump.

Cost of Production.

This mine is not as expensive as the ordinary mine to work, from the fact that the walls are hard and regular, and the dip of the lode relieves the stulls from the weight, so that at a height of 30 feet the debris rests on the foot wall, the vein filling in soft, and where hard the ground is very big and easily broken. 1400

Miners receive $2.50 per day and trammers $2.00. Timbers and lumber, California redwood, which is very long-lived underground, can be delivered at the mine at from $22.00 to $25.00 per thousand. Coal at $3.25 per ton. The price of breaking ground on contract in sinking main shaft, $5.00; for drifting, $3.00, and raising, $2.75 per foot. The actual cost of the mill run of 25 tons, extracted under my supervision, was about $36.00 for labor. Allowing a proportionate cost for sinking, drifting and timbering, I consider $2.35 per ton a fair amount to be charged to the cost of production per ton throughout the whole mine. I have said nothing about the mill so far, as the Bryan mill now in use has been ample for the purpose it has been used for by the proprietor, namely, for the treatment of the ore extracted in development. He treats about six tons a day of ten hours at a cost of about $1.00 per ton. With surroundings of the crudest kind, this has paid all costs and left a handsome monthly dividend. 1401

1402 "ORE."

The surface cuts, made at frequent intervals, show remarkable values in clean, coarse, free-milling gold. It is composed of quartz, talc and decomposed granite near the top and west of the present shaft, panning at the rate of from $40.00 to $100.00 per ton. Even the rotten granite and soil will assay from $3.00 to $5.00 per ton. With the exception of some 286 feet of drift stulled, but not stoped, on the two north levels, the stopes on each level are being carried up to an average height of 20 feet, so that estimates were made from accurate measurements.

1403 made at every ten feet along the backs of the stopes, and fortified by measurements in raises, absolutely giving as close figures as can be determined in any method of mining except by absolutely breaking and weighing the product. Before stating estimates, I would premise that I made measurements at, at least, every ten feet, and against the mine, and have taken the lowest value per ton, as shown by records of proceeds of actual mill runs covering the months of July, August, September and October of the present year. The official bullion returns of each month from the U. S. Mint at San Francisco I examined. These statements give as follows:

1404 July, 160 tons bullion, sold for $2,760, equals $17.25 per ton. Aug. and Sept., 300 tons bullion, sold for $5,008, equals $16.69 per ton. Oct., 112 tons bullion, sold for $1,850, equals $16.52 per ton, or an average of $16.81 per ton.

I would also add that the average of the assays made by me, besides numerous panningss, made exclusive of high assays, such as those previously mentioned, was $23.00, and one made of an eight-inch streak in the breast of the first level north gave $884.40 per ton. The sulphides, locally called sulphurets, which are lost but can be easily saved, carry an average value of about $7.00, in the tailings, per ton, and will pay the cost of mining and

milling, thus leaving the retort gold product clear 1405
profit. An assay of clean sulphurets, taken in cleaning the amalgamator, gave $1,364 a ton, but if worth $200 a ton, would fulfill the above conditions. Hence, from the method described above, I can safely submit the following:

ORE IN RESERVE.

1st level north, 517x224 feet; average width, 28 in.; 22,517 tons at $17,	$382,789
117x250 feet, 4,266 tons at $17,	72,522
1st level south, 250x210; average width, 20 in.; equals 8,020 tons at $17,	136,340 1406
2d level north, 670x75 feet; average width, 24 in.; 8,213 tons at $17,	139,621
75x250 feet; average width, 30 in.; 3,906 tons at $17,	66,402
Total ore in reserve, 46,922 tons at $17,	$797,674

or enough ore on the two upper levels to keep a 40-ton mill running for three years.

The above estimates allow twelve cubic feet of quartz to one ton. The smallest measurement taken, 6 inches; the largest, 62 inches.

The test run of 25 tons was conducted as follows:

The ore was taken from every level of the mine 1407
and at various points. It was mined, hoisted and milled under my supervision. The plates cleaned up, the amalgam retorted and the retort weighed in my presence. The proprietor took duplicate samples and mine were forwarded to Georgetown, Colorado, and assayed there. As the record shows, the average yearly mill runs I took in this test the quartz alone, and as little outside the vein filling as possible, in order to get a test of the ore body itself as far as possible.

25 tons of crude ore, assaying $38 per ton,	$900.00
Retort 51 Troy ounces of gold, 710 fine,	724.00
Loss in tailings,	176.00

1408 Mining this 25 tons at $2.25, $56.25
Milling at present cost, 25.00
Therefore the net profit on 25 tons, 643.25
and this paid the expenses of mining for the month of November.

ORE IN SIGHT.

On the second level south, at a point 160 feet south of the main shaft, an extremely rich chute of ore was found. In following this down for prospecting purposes, ore was extracted that will run over $500 a ton; and assayed as high as $4,600. This, for prospecting purposes, was followed to a
1409 depth of 50 feet and kept up in size and value. From an examination of the shaft, when the water was lowest and very careful inquiry, I am satisfied that the main shaft, below the point examined, is still in ore, and that the crevice grows larger with depth and the gold coarser.

I also measured and sampled the ore showing along the bottom of the second level north and south as far as practicable, without taking up the track, to get the foot wall streak accurately, and if anything, it averaged larger in size than in the back of the same level; hence, it is fair to estimate it as ore in sight, the question of its extraction
1410 being only of sinking the shaft 30 feet further and driving levels from the bottom. At an average of two feet and $17 per ton, 19,833 tons, value $337,161.

PROSPECTIVE VALUES.

The old workings, north of the main shaft, show the existence of a large and continuous ore body. A shaft having been sunk 110 feet on the San Jacinto, from which several thousand dollars were taken, and as the surface has been opened up by cuts, block by block, excellent pannings were obtained—a more satisfactory test of such values than by assays. As the drifts leading into this

ground are in good paying ore, it is reasonable to 1411
judge that this new ground on the north will at least average the product of the reserve opened up south.

Again, I am of the opinion that better and richer ore bodies, at even the depth attained, are to be found at the north end of the San Jacinto claim, where an iron-capped ledge bears obliquely to the vein and joins it. This ledge has been overlooked in former examinations, but I consider it a very valuable adjunct to the property. It may itself develop into a fine mine; but as a feeder to the vein now described it bears the relation that a large stream does to a river. 1412

To effectually and economically mine this ore will require the sinking of a double compartment mining shaft at the north end of the claim; and when drifted through, it would produce, in the same ratio, 58,233 tons at a depth of 350 feet, which, at an average of $17 per ton, would realize $991,661. This work could be done in less than two years at a cost of about $16,000, and the ore found excavated and hoisted to surface at a cost of about $189,000.

RESUMÉ OF VALUES.

Ore in reserve, blocked out and ready for stoping, 46,922 tons at $17.00,	$797,674.00	1413
Ore in sight in present working below second level, 19,133 tons at $17,	337,161.00	
Prospective value of north end determined from surface opening and condition of north drifts in mine, 58,233 tons at $17,	991,671.00	

Besides this ground there is territory to the south 1,900 feet long, with an undeveloped value, but easily capable of development into another mine, so that it is practicable to make on this property three mines represented by three main shafts, and these estimates have been made upon a depth of 350 feet only, with the exception of the

1414 ore in sight, which is the block through which the present main shaft is sunk. There is no reason why these ore bodies will not keep on with depth for the crevice is larger, the gold coarser, and the conditions such that it could be almost a physical impossibility for them to totally disappear. The gold mine of Gilpin Co., Colorado, in similar formation, hold out even at 2,100 feet depth and mines such as the Idaho, in similar formation, in California, are working profitably at a depth of 3,200 feet. After the erection of a 40-ton mill, this property ought to net from thirty to forty thousand dollars a month, and keep reserves ahead of
1415 $500,000. Managed energetically and on a gradually increasing scale, commensurate with its developed wealth, the dividend-paying capabilities of the property are beyond calculation, and only to be restricted by time, or conditions not now apparent to the most experienced mining engineer.

Sincerely yours,

JOHN M. S. EGAN, En."

Plaintiffs' Exhibit "A."

1416

MINING REPORT
of the
GOOD HOPE CONSOLIDATED GOLD MINE.

LOCATION.

Pinacate Mining District, San Diego County, California, four miles west of Perris, on the A. T. and Santa Fé R. R., Section 15, Township 5, South, Range 4 West, San Bernardino Meridian.

NUMBER OF CLAIMS.

Two claims, 2,500 feet x 600 feet total length—held by U. S. Patent, and one claim held by loca-

tion. In addition, there are 600 acres of good land, 1417
covered by R. R. title. This being on an earned grant is practically the same as being patented.

(See Map of Surface Claim.)

History.

The small arroyos leading from the Good Hope Ledge were worked for placer gold prior to 1874, but as none of the arroyos furnished gold above a certain N.E. and S.W. line, the miners were led to begin a systematic search for the hidden ledge.

The Good Hope Mine is practically a blind lead, 1418
being some distance from the mountains, and only uncovered by trenching through the soil to the solid foundation. This was done in many places and finally, in 1874, the true vein was found.

The first locaters were Mexicans and a Frenchman by the name of Mache. They found the vein in numerous places along its course, and worked the ore in arrastras for several years. The arrastras can still be seen down the arroyo from the present mill, though the grade of the ore worked can only be estimated by a few scattered heaps of quartz, which have been left around the arrastras and assay from 5 to 35 dollars a ton. The property 1419
next passed into the hands of Messrs. Moore, Van Slyck and Barber.

At this time, most of the old work at north end (see map), was done; a five-stamp mill was erected and finally the two claims were consolidated, making the present length of ground patented 2,500 feet. The production from these old workings cannot be accurately stated, but from careful inquiry from disinterested parties and from the banker who shipped most of the bullion, I am informed that $260,000 has been produced. This amount does not conflict with the quality of quartz left, or the size of the old dumps still in sight (see photos of old workings). The two old workings

1420 are 1,000 feet apart, and the evidence of their bullion production is most valuable, as showing the remarkable length of the ore shoots. At no place up to this time had a greater depth than 110 feet been reached, mainly on account of the water, the poor facilities for hoisting (horse whim), and the custom of spending all the money taken from a stope before doing any dead work.

The present owners, Messrs. J. M. Sigafus and J. Everett Bird, purchased the property two years ago, settled the titles and commenced a systematic exploration of the vein between the two old workings, and with what success can be learned from a
1421 perusal of the report.

Geology and Description of Vein.

The Good Hope is a fissure vein with slight or no variation from a N. E. and S. W. trend. It has a dip to the N. W. of 60 degrees and a width between walls of from three to ten feet.

The wall rocks and immediate formation are syenitic granite, and the fill between the walls is talc and granite more or less decomposed and mixed with quartz, and a well-defined pay-streak of quartz varying from one to five feet in width,
1422 often of a banded structure and usually laying on the foot wall.

The walls are firm and hard, the foot wall occasionally making a wave or depression at which points the pay-streak is usually very wide or consists of two streaks of good size and richness. (Easily may be seen in photo No. 1).

Parallel with the vein on the northwest is a belt of porphyry from 10 to 30 feet wide, which can be traced over a mile and is distant from the vein from 50 to 100 feet. As near as could be ascertained, this belt has a dip in the same direction as the vein, but at about 15 degrees nearer vertical. The general formation of the surrounding country

is granite, crossed at intervals by irregular belts of syenite having no distinct demarkation between it and the granite. 1423

There are numerous veins in this district, many of which have produced fairly well, though as far as I could learn, none have been worked to a greater depth than 100 feet.

The altitude of the camp is 1,700 feet above sea level.

DETAILED DESCRIPTION OF SURFACE.

A reference to the map herewith will show numerous small openings and open cuts made along the surface, as the vein is covered with soil in most of these, to the south the vein has been found and still shows good pay, though the streaks divide and probably the end of all pay ore to the south is covered by the locations owned by the company. Going north, the vein is opened again and again until the old workings on San Jacinto are reached. 1424

Beyond this, the wash from the hills back of the mine has covered too deep to trench and catch the croppings, for a distance of 1,000 feet when it is again opened up by surface workings every hundred feet or so until a point about 1,500 feet north of old workings is reached where there is a new shaft sunk to water level 58 feet, and two small drifts run showing a fine 3 ft. pay-streak, and good ore of the same grade as the average of the mine. Just north of this is a 20 ft. shaft showing ore assaying $6, and 135 feet north of the 58 ft. shaft is a 40 ft. shaft; the ore from this was milled a number of years ago. The vein is well defined and from 2 ft. to 3 ft. pay-streak. Samples taken at points accessible gave $8.06, $12, $38, $3.20 and $7.50 per ton; hand samples panned very much better. Numerous pannings and hornings were made at all the openings showing vein, and where the quartz 1425

1426 were free from pyrites the result tallied with the assays.

The quartz on all dumps assayed from a trace to $50 per ton, the same holds good of south and surface openings. The conclusions reached are that at no place on the vein so far opened are there long stretches of barren ground—the extreme distances sampled being 3,300 feet apart.

The amount of ground needing exploration on this vein would keep the present hoists busy for several years and with very profitable results. Included in the 600 acres of land there are several other ledges, formerly worked by the Mexicans,
1427 and the ore left around their arrastras showed gold. There is also a very large iron ledge crossing obliquely toward the Good Hope vein, which should, at some time, be explored, as it appears to be mineralized, and is from eight to twenty feet wide. I did not sample it, as being so large it would have taken a long time, and the owners informed me that they could get a little gold from it, but attached no great value to it.

The surface value of the 600 acres is about $25 per acre, and of surface improvements about $50,000—this includes mill, hoisting works, all machinery, and residence.

1428

GENERAL DEVELOPMENT.

It will be seen, by reference to map, that the development on this vein is extensive, and done to good advantage for the betterment of the property. The actual number of feet that can be explored at present is confined to the work done by the present owners in the last two years. The shafts at north end of San Jacinto claim, being marked on map as given by men who worked in them, and from the surface measurements. A reference to photo No. 5 will show the dumps from these workings to be very large and to corroborate the statement of men.

The number of feet development by present owners is 2,900 feet, as can be seen by the map; depth attained, 416 feet; continuous development on ore shoot, 900 feet, with contracts now let for 200 feet more. The favorable indications mentioned in a former report, dated January 10th, 1891, have been more than fulfilled, and the property is now on a dividend-paying basis, with increasing ore reserves, and a remarkable length of ore shoot shown up and at such a depth that all danger of surface displacement of ledge is past. It is next in order to give an accurate detailed account of the property, block by block. 1429

1430

DETAILS OF ORE RESERVES, BY BLOCKS.

Block No. 1.

Dimensions, 333 x 245 feet, with an average width of about two feet, gives a tonnage of 13,599 tons—figuring twelve cubic feet to the ton, and taking the average of $18 per ton (which is several dollars less than was actually saved by a year's run of the mill without concentrators, as is shown by the records of $23.78 per ton), gives a value of

$244,732

Block No. 2.

1431

Dimensions, 256 x 130, and 156 x 100, tons,	8,146
Total value,	146,620

Block No. 3.

Dimensions, 77 x 256, feet, tons,	3,285
Total value,	59,130

Block No. 4.

Dimensions, 120 x 94 feet, tons,	2,046
Total value,	36,828

Block No. 5.

Dimensions, 213 x 94 feet, tons,	3,337
Total value,	60,066

1432 Block No. 6.

Dimensions,	265 x 245 feet, tons,	10,820
	Total value,	194,760

Block No. 7.

Dimensions,	210 x 100 feet, tons,	3,500
	Total value,	63,000

TOTALS.

Block No. 1,	13,599 tons,		$244,782
" " 2,	3,146 "		146,620
" " 3,	3,285 "		59,130
1433 " " 4,	2,046 "		36,828
" " 5,	3,337 "		60,066
" " 6,	10,820 "		194,760
" " 7,	3,500 "		63,000
Total tonnage in reserve,	44,733 tons, net,		$805,186 Cash value.

The average widths of actual pay streak was obtained by measuring every ten feet across the vein throughout the entire workings.

1434

RETURNS OF GOLD BULLION FROM U. S. ASSAY OFFICE TO THE GOOD HOPE CONSOLIDATED MINES.

Date.	Before Milling. Ounces.	After Milling. Ounces.	Fineness.	Gold Value.	Silver Fineness.	Silver Dolls. Cents.	Cost of Refining.	Net Value.
March 4, 1890.	93.26	93.26	704	1,355.16	262	22.94	6.72	1,369.88
March 9, 1890.	83.83	82.20	596	1,013.58	172	13.22	6.44	1,018.86
April 14, 1890.	125.80	120.75	230	574.10	90	14.05	10.54	577.61
May 17, 1891.	127.72	124.80	714½	2,359.27	178	8.29	6.22	2,361.34
May 30, 1891.	138.64	135.05	706	2,529.31	186	10.03	6.64	2,532.70
June 5, 1891.	123.26	116.50	727	1,750.81	156	28.00	8.16	1,770.65
June 15, 1891.	138.64	135.05	726	2,529.31	186	10.03	6.64	2,532.70
June 30, 1891.	80.44	79.44	888	1,458.25	82	5.61	4.32	1,459.54
July 10, 1891.	160.23	155.11	721	2,311.81	263	38.47	9.54	2,340.74
July 20, 1891.	189.50	187.76	703½	3,506.79	186	13.63	8.85	3,511.57
Aug. 24, 1891.	120.86	116.51	713	1,717.23	172	29.82	8.16	1,738.89
Nov. 27, 1891.	117.26	113.30	712½	1,668.74	168½	28.62	7.96	1,684.50
Dec. 10. 1891.	134.04	133.89	883½	2,445.30	78	8.73	6.59	2,447.45
Oct. 14. 1891.	118.00	112.32	709	1,646.26	172	28.75	7.90	1,660.15
Oct. 30, 1891.	185.80	185.70	855	3,282.14	72	11.11	8.75	3,284.50
Nov. 10, 1891.	48.60	48.54	800	903.07	83	3.39	3.03	903.43
Dec. 25, 1891.	113.50	113.40	855	2,004.80	80	7.64	5.73	2,006.19
Jan. 2, 1892.	114.66	114.48	705	1,668.39	264	28.43	8.03	1,682.19
Jan. 10, 1892.	61.85	61.76	628½	802.40	157	2.95	3.55	801.80
Feb. 1, 1892.	118.40	117.84	792	1,685.68	162	27.53	4.88	1,708.33
Mch. 15, 1891.	181.80	180.00	750	3,365.58	182	12.76	8.53	3,369.81
Mch. 30, 1891.	111.50	110.00	790	2,023.77	183	8.14	5.60	2,026.31
Apl. 6, 1891.	122.32	122.15	710½	1,794.05	269½	32.04	8.51	1,811.58
Apl. 14, 1891.	111.80	108.70	712	2,049.29	276	7.02	5.55	2,050.76
Apl. 30, 1891.	76.20	74.50	721½	1,403.76	270	5.10	4.12	1,404.74
May 1, 1891.	127.72	124.80	714	2,359.27	178	8.29	6.22	2,361.34
May 6, 1891.	99.07	99.07	706	1,445.84	244	23.46	6.08	1,463.22

1437 1436 1435

479

117

1438 ORE IN SIGHT.

The ore on the lower level below the reserves having been opened in three places, by shaft and winze, to an average of 33 feet, places this ore in sight for the length of lower level, or 900 feet at an average of two feet in width, gives a tonnage of 4,950 tons.

Net value of $89,100.

As both the San Jacinto and Good Hope Mines have produced, beyond question, large sums of money, both before and after consolidation, reaching, on north end of ledge (San Jacinto), a depth
1439 of 110 feet, and on south end 150 feet (Good Hope), leaving a large block of ground between them, it was believed by the present owners that there was profitable ore, and the main efforts at development has been between these old workings. Now, as connection has been made with the south workings, and it is clearly proven to be one continuous vein, and as the surface cuts and shafts show its continuity to the old workings north, and thoroughly explored, block by block, for a distance of 900 feet, places the ore in sight to at least the depth of present workings, and from the old workings of San Jacinto to the old workings of Good Hope, less the ore in reserve, gives a block 640x360 feet, equal
1440 to 37,333 tons.

At $18 per ton, equal to	$671,994
Total in sight, $89,100 and $671,994,	761,094

The drifts north are both being driven, and, on widening pay-streak, between well-defined walls. In a few months this entire block, now figured as being in sight, can be placed as ore reserve.

WIDTH OF PAY ORE.

Attached to this report are the widths, in inches, of the actual pay-streak, taking every ten feet, irresponsive of condition of vein at this point. The first 200 feet of shaft is not measured, as no ore

from it went to mill, the pay-streak being on the foot wall, and the shaft sunk on the hanging wall. 1441

Shaft No. 1 is an old shaft, cleaned out, and its ore still lies at surface, and assays $2 per ton.

Shaft No. 3 the ore was all milled. (See note on Bullion Returns.) The fissure varies from four to ten feet in width, and is sometimes mineralized, and talc gouge also. This with a small percentage of ore, which, mixed with the gangue, makes it quite probable that the entire waste-dump, after running over grizzlies, would pay between $3 and $4 per ton, which could, at some future time, be run to mill at good profit.

1442

TABLE OF WIDTHS.

Shaft No. 2, taken every ten feet where not prevented by timbers, gave, in inches, 12-18-12-7-17-48-36-24. First level north of shaft 2, inches, 14-16-18-16-16-15-18-14-13-14-18-14-20-17-18-21-20-17-22-30-32-29-27-25-23-36-48-33-20-20-29-21 and 28.

Second winze, connecting first and second levels, 400 feet north of shaft No. 2, beginning 10 feet above lower level, gives, in inches, 27-33-22-19-34-28-32-20-25—distance 94 feet.

First winze north of shaft No. 2, connecting first and second levels, gave, in inches, 27-28-30-26-23-32-3[illegible]—distance 94 feet. 1443

Upper level, between shafts Nos. 1 and 2, distance 256 feet, beginning at shaft No. 2, gave, in inches, 30-22-20-34-36-20-32-18-28-11-14-16-12-14-12-14-12-13-12-14-36-30-26-28-32.

Lower level, between shafts 1 and 2, being the widths in entire length of stope, 256 feet, gave, in inches, 31-39-32-28-20-30-28-27-33-35-28-30-28-36-34-30-35-36-28-26-23-22-21-26-22-24 and 19.

These numerous measurements show that the pay is very even and continuous through the entire mine; sometimes there are two pay-streaks, but most of the pay is on the foot wall.

1444 In some places feeders to the vein join the main pay-streak, and make from 3 to 4 feet of ore, but the steady width of pay is 18 inches throughout, increasing as they go north gradually.

Assays.

In a former report on this property, and at various times since, I have made exhaustive assays, taking great care to carefully average the samples taken, and attached find table of all assays made where an average of entire width of pay-streak was sought, and leaving out all special assays on rich samples—concentrates, sulphurets, etc. It
1445 will be noticed that the general average is very close to the bullion produced, but the quickest and most satisfactory test is the record of the entire mill-run to date, and of for more importance than the assays. This shows the value per ton by simple amalgamation to be $23.78.

$76.47		$4.03	
31.02	$16.60	14.46	$22.73
23.15	8.26	1.00	4.13
14.46	22.73	4.13	20.67
24.80	4.20	4.13	48.00
8.26	6.20	28.93	12.20
2.02	51.67	80.60	180.53
1446 10.35	124.02	4.13	32.03
4.13	22.73	18.60	44.13
3.13	28.93	1.00	18.00
24.80	16.53	64.07	41.34
		1.50	
3.00	1.03	51.69	245.97
		14.46	
6.20	2.06	10.35	120.02
3.03	1.03	6.20	10.35
6.20	4.13	43.40	2.06
4.13	24.80	10.35	18.60
6.20	6.20	6.20	39.27
20.26	18.60	43.40	4.13
8.16	47.54	4.13	2.08
	18.60	26.87	

Test of Tailings.

1447

The tailings from this mine constantly average from $6 to $8 per ton, and the gold is in the sulphurates, which constitute about two per cent. of entire ore, and make an admirable product when passed over a good concentrator. The tests made show only $2.39 remained in the tailings after concentration. The sweeping of the troughs at the present mill assay $185 per ton, and an average charge of ore ground with quicksilver and cyanide of potassium gave the following results:

Pulp assayed,	$18.40
Concentrates, percentage,	2%
Tailings assayed,	2.39
Free gold,	10.81
Value of concentrates, per ton,	260.
Percentage saved,	87%

1448

A test on about 500 tons of tailings made in the previous examination yielded as follows: Tailings assayed $8 saved by pan grindings and concentrating $5.20. A test just made on 2,000 tons of tailings yielded as follows:

Tailings assayed,	$6.21
After pan grinding and concentrating,	2.08
Saved,	4.13

1449

No effort has been made to save this valuable product of the mine, and there is now in the tailing dump $10,000, needing only to be passed over concentrators, and this one item of tailings will pay all operating expenses of the mine; the concentrates being a valuable flux at the smelters, it is more profitable to ship to them than to roast and mill at the mine.

Mill Run.

The production of $57,879.78 during the past year is taken as an average of all ore in the mine, because the ore has all been milled just as it came out, sometimes showing low returns, and some-

1450 times as high as $7,000 in a month. Block 3 has been stopped to a height of 25 feet for 100 feet in length, and an average height of 17 feet for entire length of block 256 feet (see map), furnishing 501 tons of the ore milled, and 410 tons coming from various parts of the mine, the balance, 1,523 tons, coming from the development of 2,200 feet of levels and shafts. The quickest and easiest way to test the value of the ore is to make good mill run, and make a test run of 100 or 200 tons, taken fairly from all parts of the mine.

There is an assay office with the mill, equipped with all necessary outfit for simple assaying.
1451 There is a fine concentrator at the mill which could be set up at a trifling cost and practically demonstrate the value in the tailings. It is not now in use, the owners preferring to experiment with troughs and brooms at odd intervals, and when the troughs are carefully swept every half hour the result is really astonishing.

Rich Ores.

At a point 200 feet south of shaft No. 2, on lower level, a 10 ft. winze has struck the apex of a very rich shoot of ore, similar to the rich shoot in the old workings above it, from which was taken
1452 $160,000. This ore is a heavy sulphurate, and carries wire gold. It assays from $25 to $600 per ton, with many specimens running into the thousands. I should place the milling value of this shoot at $100 per ton. In sinking shaft No. 1, a distance of 33 feet, this same ore was encountered, showing this remarkable shoot to be 56 feet long. It is the intention of the owners as soon as contracts on north drifts are finished to sink main shaft and drift south under this ore body.

Plant at Mine.

The equipment consists of one Bryant mill of the capacity of ten stamps. One self feeder. (Chal-

lenge) power for mill furnished by one 15-H. P. 1453
engine and a 40-H. P. boiler. One concentrator, frue vanner, one dodge rock breaker, all in good condition, though placed in rather too small a building, somewhat crowded the machinery (see photo of mill).

At shaft one is a good Lidgerwood hoist and a 40-H. P. boiler. At shaft two the same. These hoists have a capacity of 1,000 feet with $\frac{5}{8}$-inch cable, and a hoisting power of 3,200 lbs. vertical lift. Suitable buildings covering hoists and a 25 ft. gallows frame, the ore being dumped from skip direct into car, and trammed to bins at mill 250 ft. from hoist. 1454

Three self dumping cars, 4 x 2 x 2, and three ore and water skips, 2 x 2 x 6. There is also at shaft three one new 40-H. P. Corliss engine, one 2,500 gallon tank, galvanized iron, one 300 gallon tank, galvanized iron. The surface building consists of the mill and 2 hoists, a large barn, one house for superintendent, one boarding house, one bunk house, one four-room assay office and store house, a fine $10,000 residence (see photos).

All the buildings, save the new residence, have been built a number of years, but are still serviceable for many years, though not having the neat 1455
appearance of a newly equipped mine. There has just been finished one new cement reservoir, holding 25,000 gallons, which is filled with water from a well, a No. 4 pulsometer when the mine fails to furnish the amount needed for the mill. The underground equipment consists of one low pressure Hooker pump, 4-inch stroke, 6-inch cylinder, water by 4-inch, good pump for 100 ft. One Cameron horizontal pump, capacity 300 feet, one new Knowles pump, 16 cylinder, 6-inch water cylinder, good for 800 ft. 400 feet 4-inch water pipe in mine, 300 feet 4-inch water pipe to mill, 1,500 feet from spring to private residence and boarding house, 1,700 feet

1456 T rails, and the usual amount of tools, blacksmith outfit, ammunition, etc., etc.

Plant Proposed at Mine.

As there are no problems of treatment requiring special plant, it is mostly a matter of expediency as to the size of mill and power of hoist used. In my former report I recommended a 20-stamp mill built to add 10 more stamps. The Bryan mill was then in operation, but as it had run only a very short time, it had not proven itself a profitable and perfect mill, but at this date, after a steady run of
1457 months, it is still in good shape, and on this particular kind of ore, is certainly a success, being a rapid grinder and good amalgamater, and costing but $1,850 f. o. b. in San Francisco, which is much cheaper than stamps, and, in this instance, proved as effective. The present owners sold the five-stamp mill, which was purchased with the property. The hoists, pumps and boilers, and the Corliss engine, are ample to run three Bryan mills, so the only additional cost to treble the present plant would be two extra mills, and the sheds to cover them, plus belting, etc. The sulphurates now allowed to pass over in the tailings could easily be saved by using Turlock concentrators, or frue
1458 vanners improved, and the water to supply this extra plant can be obtained from the hills above the mines at small expense, unless large bodies of water should be struck in the lower workings, of which there is no indication yet, as the mine has increased in water only a trifle in the entire year's development. There is now going over in the tailings enough sulphurates to cover all mining and milling expenses, as before stated.

The owners have placed floor matting on the bottom of the sluice boxes, and by sweeping these with a broom, have collected several tons of concentrates, which assay $185 per ton (see tests on tailings, page 14).

An expenditure of $7,000 should cover all plant 1459
needed to treble the output of mine, $1,000 to shed same; total, $8,000.

EXPENSE ACCOUNT.

The following is the expense account of the mine, month by month, from the time the Bryan mill started, 12 months, but in the absence of the owners during the summer, the mill was shut down over two months, and it was run only day-times during the other months, except a few nights in February. So the exact tonnage of the mill, month by month, does not appear; but in statements for- 1460
warded by the superintendent to the owners every other day, beginning July 14th, there appears a number of car loads of ore hoisted, which is 1,774. These cars hold 12 3/10 cubic feet, weighing between 1,200 and 1,500 lbs. per car. All the ore from the openings has been milled, save a small amount in shaft No. 1.

The tonnage was obtained by carefully measuring these openings, and what ore was taken from the stopes. The average tons milled per day, not counting the stopes, is 6 6/10, but the Bryan mill, when run by a competent man, will crush 20 tons of this ore in 24 hours, and Mr. Bryan ran a ton an 1461
hour, and amalgamated very closely, but as he is the inventor of the mill it would hardly be expected to keep up his run. There are from seven to twelve men employed at the mine; complete and accurate data can be obtained from the books kept by the Company, which are free for inspection at the mine.

1462 MONTHLY EXPENSES:

Including coal, lumber, repairs, etc.

	1891.		
	Feby	$535 11	
	March	732 77	
	April	361 31	
	May	484 60	
	June	559 96	
	July	385 41	
	August	324 46	
	Sept.	402 17	
	Oct	421 48	
1463	Nov.	530 07	
	Dec.	452 22	
	Jany, '92.	490 00	
		$5,779 56	$5,779 56

PAY ROLL

Of all labor employed at the mine for 12 mos.

	1891.		
	Feby	$497 98	
	March	668 11	
1464	April	811 44	
	May	887 50	
	June	935 37	
	July	942 75	
	Aug.	951 00	
	Sept.	643 87	
	Oct	812 01	
	Nov.	839 68	
	Dec.	798 37	
	Jan. '92	941 36	
		$9,729 44	$9,729 44
	Total expense for past twelve months		$15,509 00

The cost per foot of driving drift on this property 1465
is $2.75 to $3, and contracts are now let at these figures. Each man is stopes can produce two tons of ore, the pay-streaks having a talc gouge making mining very easy. The vein requiring only light timbers, except at pumping station and main shaft.

Topography, Supplies and Roads.

For a mining camp this property has some remarkable advantages, lying, as it does, in the Orange Belt of Southern California, being only 12 miles from the orange groves of Riverside, and surrounded by young orchards and grain fields, and entitled to its *pro rata* of Southern California climate, and at the same time only four miles from a good-sized town (Perris, on Santa Fe R. R.), and enabled to get coal direct from the mines, delivered for $2.25 per ton, the coal mine being only six miles from the mine. The water shed is into Lake Elsinore, distant about eight miles. The surrounding country is slightly rolling, and the altitude of the mine about 1,700 feet. The roads are firm and exceptionally good. 1466

Cost of freight from Perris to mine, 50 cents per ton.

Cost of lumber (best O. P.), $24 per M. Grain, 1467
hay, etc., at Los Angeles, prices very cheap.

Resumé.

The commercial value of a mine is based: First, on actual ore in reserve, which, in this instance, is a very handsome amount, $805,186. Second, on what is in sight; ore that lies immediately below or beyond the actual faces measured in reserves, $761,094. Third on its prospective value, which is determined by a close study of the walls, the length of pay shoot, the depth attained by other mines in the same district, and formation, kind of vein, and numerous other characteristics familiar to an ex-

perienced mining man. The points in favor of this being a long-lived mine are certainly very strong. It is located in a country that yet leads all the world in the production of gold; the average of all the gold mines of California is about $12; this mine's average is over $20, free, as is shown by the mill returns for the past twelve months, and in order for this report to be conservative, and to be within all degree of doubt, I have placed the average at $18 per ton. It is, furthermore, a true fissure vein, with good walls, and the general strike of the great mines of the coast—northeast and southwest. The quartz, in miners' parlance, is lively, and carries sulphurates of iron, with traces of antimony and a little galena, similar to the noted mines of the State, and it has already developed one of the largest ore shoots ever known in a gold ledge, and neither end yet reached, and the surface indications of a still greater length.

This fact is undoubtedly the strongest recommendation for the mine as to all its workings, everything pays to mill. The surface test show the mineralization of this vein to be over 3,300 feet, not counting the part of the vein (1,000 feet) covered by local wash. There is, in fact, no reasonable doubt of this being one of those permanent and well mineralized veins that have been found in this State, and it should be worked to such a depth until the cost of mining destroys the present large profits, as it now costs less than 20 cents to produce $1, the surroundings of the property being exceptionally favorable in all respects—roads, fuel, water, lumber, labor, climate and supplies.

Comparing this mine with some of the noted mines of the Coast, the close resemblance will be seen. The Empire Mine has the longest ore shoot known, 1,800 feet, and a shorter one of 600 feet; the average width of its pay streak is only 15 inches, and it hoists 18,000 gallons of water an hour; depth attained, 1,900 feet.

Value concentrates, per ton, $120 to $200; per-

centage of sulphurates, 3%. The famous Idaho mine, 1471
of Grass Valley, has an average pay-streak of 18 inches, and the wonderful length of 1,300 feet of pay shoot. It is paying dividends at a depth of 3,100 feet, on the vein, and a vertical depth of 2,000 feet, and within the last year another rich ore body has been found at these depths, which bids fair to prolong the life of this mine indefinitely. Yet the average of all ore worked is only $20 per ton. This is probably the greatest dividend payer for the capital invested of any mine in the U. S. The comparison of ore shoot values, character of ores, etc., being very similar, it remains to consider the surroundings as to present and future expense. Labor, transportation, etc., in the Pinacate District 1472
are the same as Grass Valley, but in the matter of water the advantage is greatly in favor of the latter district; this being in a country of less yearly rainfall, and *not* flanked by the snowy Sierras, there is little probability of water ever interfering seriously with the working of the mine.

I do not believe that after a careful examination, any mining expert, who dares hazard an opinion, can show why this should not be a permanent and lasting vein. This property, under an energetic management, should produce from $30,000 to $40,000 per month, net, and keep the development even with the output. 1473

SUMMARY.

Length of ore shoot,	3,300 feet
Lowest depth attained,	416 feet
Number of feet developed,	3,000 feet
Width of fissure,	4 to 10 feet
Width of pay streak,	Average of 2 feet
Tonnage in reserve,	44,733
Net value in reserves,	$805,186
Tonnage in sight,	37,333 tons
Net value in sight,	$761,094
Average of all ore milled per ton,	$23.78
Number of tons milled,	2,434
Bullion produced in the past 12 months,	$57,879.78
Total expense,	$15,509
Estimated total bullion produced,	$317,879.78

1474 **Plaintiffs' Exhibit No. 1.**

Agreement between W. H. Griffith and Porter, Hobson and Morse.

Agreement made and entered into this eighteenth day of December, A. D. 1893, by and between W. H. Griffith, of the City of Denver, Colorado, party of the first part, and Dudley Porter, John L. Hobson and Charles W. Morse, of the City of Haverhill, Massachusetts, parties of the second part:

Witnesseth: That in consideration of one dollar and other valuable consideration paid to the said
1475 party of the first part by the said parties of the second part the said party of the first part hereby sells, assigns, transfers and conveys to the said parties of the second part, their heirs, administrators and assigns, the following property, to wit:

All those two certain mining claims known as the "Good Hope" and "San Jacinto," and that certain mining location known as the "Annex," all being located in the Pinacate Mining District, County of Riverside and State of California, together with all the mills, boilers, engines, tracks, cars, silver plates and mining tools and equipments of any nature in or appurtenant to or used in con-
1476 nection with said property.

Also six hundred acres of land situated in said County of Riverside, and being the same land purchased by James M. Sigafus from the Southern Pacific Railroad Company by contract, and being more fully described in said contract mentioned:

The purchase price of said property is the sum of four hundred thousand dollars, which shall be paid as follows, to wit:

One hundred and fifty thousand dollars on or before the first day of January, A. D. 1894, at the City of Riverside, State of California, or as soon thereafter as the title to said claims and location and real and personal property can be examined by

said parties of the second part, in case they do not 1477
examine it before said January first;

One hundred thousand dollars by mortgage for that amount, payable on the first day of July, A. D. 1894, to be given as hereinafter stated;

One hundred and fifty thousand dollars by mortgage for that amount, payable on the first day of January, A. D. 1895, and to be given as hereinafter stated;

Upon payment of the sum of one hundred and fifty thousand dollars on the first day of January, A. D. 1894, or thereafter, as hereinbefore provided, the party of the first part, his heirs, administrators and assigns shall have conveyed to said parties of 1478
the second part, their heirs, administrators and assigns, or to some person or corporation designated by them, full and complete title to all the above mentioned property, or shall have caused such title to have been so conveyed by the Good Hope Consolidated Gold Mining Company, in whom the title to said properties is now vested, or from James M. Sigafus, he having acquired good title thereto, and shall also have assigned to said parties of the second part, their heirs, administrators and assigns, or to some person designated by them, all the capital stock of said Mining Company and the above-mentioned contract for the purchase of six 1479
hundred acres of land by James M. Sigafus, in whom the title of said property is now vested, and shall also have delivered to said parties of the second part, or to some person or corporation designated by them, full and complete possession of all said claims, location and real and personal estate, provided the said parties of the second part, their heirs, administrators and assigns, or the person or corporation to whom such conveyance is made, at the same time delivers to said party of the first part, or his heirs, administrators and assigns, a first mortgage securing payment of said one hundred thousand dollars, payable on the first day of July,

1480 1894, and securing payment of said one hundred and fifty thousand dollars, payable on the first day of January, 1895, upon all the above-mentioned property, conveying good mortgage title.

It is agreed by the parties hereto that the parties of the second part, as well as the person or persons who shall execute said mortgage shall not be personally liable for the payment of said sums of one hundred thousand and one hundred and fifty thousand dollars, to be paid July 1st, 1894, and January first, 1895, as aforesaid; and that said mortgage shall contain a stipulation providing that the mortgagees or mortgagee is not, and shall not
1481 be, personally liable for the payments secured by said mortgage; but it is further agreed that the parties of the second part, in consideration of the agreement of the party of the first part herein contained, shall furnish the sum of twenty-five thousand dollars to be expended by the parties hereto or their assigns, in the erection of a twenty stamp mill on said mining property and in otherwise developing the same. This sum is to be raised and expended for the common benefit of the parties hereto and their assigns, and shall not constitute a lien or charge upon said property, and shall not constitute a debt.

1482 It is further stipulated and agreed that the said parties of the second part, their heirs, administrators and assigns, will, immediately after the receipt of said deed and assignment, convey, or cause to be conveyed, to the said party of the first part, his heirs, administrators and assigns, one-eighth interest in said two mining claims and mining location and six hundred acres of land and said personal property, or one-eighth of the capital stock of any corporation then owning all said property, upon the said party of the first part, his heirs, administrators and assigns, receipting for twenty-five thousand dollars of the payment due on or before January 1st, 1895; which said assignment and convey-

ance shall be a payment of twenty-five thousand 1483
dollars on said payment of January 1st, 1895.

It is further stipulated and agreed on the part of the said party of the first part, his heirs, administrators and assigns, that all of the above-mentioned property shall be clear and free of all incumbrances whatsoever at the time said property is conveyed and assigned to said parties of the second part, their heirs, administrators and assigns, or appointee; and that the said Good Hope Consolidated Gold Mining Company is possessed of title to said Good Hope and San Jacinto mining claims, by virtue of a patent issued by the United States Government; and is possessed of the title to said Annex Mining 1484
Location, by virtue of a deed from J. Everett Bird, locater of said claim, and who has done all assessment work of the same required by the laws of the Government of the United States; and that a defect in the title to any or all of said claims and locations shall excuse the parties of the second part from making any payments on account of this agreement, and shall release them from any and all liability by reason of the same, or, at the option of the parties of the second part, shall reduce the payments herein provided for to the extent of the sum or sums required to remedy such defects, leaving in other particulars the parties hereto entitled to 1485
the benefits of this agreement.

In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

W. H. GRIFFITH. [SEAL.]
DUDLEY PORTER. [SEAL.]
JOHN L. HOBSON. [SEAL.]
CHAS. W. MORSE. [SEAL.]

For value received, I hereby transfer and assign to S. F. Thompson, of Mercer, Pa., the sum of five thousand five hundred dollars of the last payment

1486 under this agreement; to Charles M. Derrickson, of same place, the sum of twenty-seven hundred and fifty dollars; to William K. Graham, of same place, the sum of thirteen hundred and seventy-five dollars; to C. E. Whistler, of same place, the sum of thirteen hundred and seventy-five dollars; to Saml. B. Griffith, of same place, the sum of three thousand dollars; to Caroline E. Griffith, of same place, the sum of three thousand dollars; and to Jacob Fillius, of Denver, Colo., the sum of one hundred and eight thousand dollars. All of said amounts being of last payment under this agreement.

1487 Witness my hand and seal this 23d day of December, A. D. 1893.

W. H. GRIFFITH. [SEAL.]

Witness:
JOHN M. S. EGAN.

For value received, I hereby assign and transfer to Caroline Foster Griffith, of Mercer, Penn., the sum of twenty-five thousand dollars of the last payment of this agreement, and I also assign to her the privilege of receipting said sum of twenty-five
1488 thousand dollars, and receiving in lieu thereof a one-eighth interest in the property mentioned in this agreement.

Witness my hand and seal this 23d day of December, A. D. 1893.

W. H. GRIFFITH. [SEAL.]

Witness:
JOHN M. S. EGAN.

Plaintiffs' Exhibit No. 2. 1489

SUBSCRIPTION PAPER OF ASSOCIATES.

Know all men by these presents, that we, whose names are hereto affixed, do severally and respectively agree with Dudley Porter, of Haverhill, in the County of Essex and Commonwealth of Massachusetts, that we will severally and respectively pay to the said Porter, on the first day of January, 1894 (or as soon after as he may require), the sums of money written opposite our several and respective names, amounting to the sum of one hundred and seventy-five thousand ($175,000) dollars, one 1490
hundred and fifty thousand ($150,000) dollars of which is to be applied as the first payment for the purchase of the Good Hope Consolidated Gold Mining Property in California, being the same described in plan submitted by J. M. S. Egan, and consisting of two certain mining claims known as the "Good Hope" and "San Jacinto" and the "Annex" mining location, all being located in the Pinacate Mining District, County of Riverside and State of California, together with all the mills, boilers, engines, silver plates and mining and milling equipments, car tracks, etc., on, or appurtenant to, or used in connection with, the aforesaid property; 1491
and the remaining twenty-five thousand ($25,000) dollars is to be expended in the erection of a twenty-stamp mill, and such further development of the property as may be deemed necessary. The purchase price for said property is four hundred thousand ($400,000) dollars, and the balance of two hundred and fifty thousand ($250,000) dollars is to be paid as follows: One hundred thousand ($100,000) dollars on the first day of July, 1894, and one hundred and fifty thousand ($150,000) dollars on the first day of January, 1895; said payments of July first, 1894, and January first, 1895, to be secured by the obligation of the corporation formed, or to be formed, for the purpose of owning and mining this

1492 property, and by a first mortgage upon said property; but twenty-five thousand ($25,000) dollars of said payment of January first, 1895, shall be made by William H. Griffith, of Denver, Colorado, and in consideration thereof the said Griffith shall be entitled to one-eighth interest in and to said mining property.

This subscription is made upon the condition that one hundred and seventy-five thousand ($175,000) dollars for the payment of January first, 1894, be fully subscribed, and that we do not hereby bind ourselves to pay the whole or any part of said payments of July first, 1894, and January first, 1895,
1493 excepting that said Griffith shall make said payment of twenty-five thousand ($25,000) dollars.

And said Porter does hereby agree with the remaining parties to this agreement that the amount written opposite his name will be applied toward said first payment upon the terms and conditions herein expressed with reference to the other subscriptions.

It is hereby understood and agreed, by and between all the parties hereto, that in case a corporation be organized for the purpose of mining and owning said property, and the said property is conveyed to said corporation, said Griffith shall be
1494 entitled to receive one-eighth interest in, and to, the capital stock of said corporation in lieu of one-eighth interest in said property as herein provided for.

The subscribers further constitute and appoint Charles W. Morse and John M. S. Egan their agents and attorneys to make said first payment of one hundred and fifty thousand ($150,000) dollars upon evidence satisfactory to them of the title to said property, and upon terms which they deem proper to ensure proper conveyances of said property to or for the benefit of the subscribers, and to form or procure to be formed a corporation to own and mine said property, and to carry into effect the

provision that said Griffith shall have one-eighth of said property, or of the stock of said corporation as herein provided, and to do any and all things necessary and proper to vest the title to the remaining seven eighths of said property or to the remaining seven-eighths of stock of the corporation formed, or to be formed, as aforesaid, in the subscribers respectively, in the respective proportions of their several and respective subscriptions. 1495

Witness our hands and common seals this eighteenth day of December, A. D. 1893.

[SEAL.]

1496

John M. S. Egan, $10,000.00, ten thousand dollars.

Charles W. Morse, $15,000.00, fifteen thousand dollars.

Dudley Porter, $15,000.00, fifteen thousand dollars.

John L. Hobson, $15,000.00, fifteen thousand dollars.

Elbridge G. Wood, $15,000.00, fifteen thousand dollars.

Boyd B. Jones, $10,000.00, ten thousand dollars.

Chas. E. Wiggin, $5,000.00, five thousand dol- 1497
lars.

D. T. Kennedy, $5,000.00, five thousand dollars.

Thomas S. Ruddock, $5,000.00, five thousand dollars.

Austin E. Ruddock, $5,000.00, five thousand dollars.

George H. Carleton, $5,000.00, five thousand dollars.

Moody & Bartlett, $5,000.00, five thousand dollars.

H. L. Dole, $3,000.00, three thousand dollars.

1498 J. Otis Wardell, $3,000.00, three thousand dollars.

Geo. H. Carleton, $3,000.00, three thousand dollars.

F. E. Hutchinson, $5,000.00, five thousand dollars.

John J. Winn, $2,500.00, twenty-five hundred dollars.

N. B. Newton, $5,000.00, five thousand dollars.

Geo. D. Morse, $1,000.00, one thousand dollars.

Wm. H. Floyd, $5,000.00, five thousand dollars.

1499 Enoch H. Howes, $2,000.00, two thousand dollars.

Mellen A. Pingree, $2,000.00, two thousand dollars.

George C. How, $1,000.00, one thousand dollars.

B. B. Jones, Agt., $1,000.00, one thousand dollars.

Charles H. Poor, $1,000.00, one thousand dollars.

Kelly Bros., $5,000.00, five thousand dollars.

E. B. George, $1,000.00, one thousand dollars.

1500 George W. Gilbert, $2,500.00, twenty-five hundred dollars.

James F. West, $1,000.00, one thousand dollars.

Howard H. Gage, $1,000.00, one thousand dollars.

Maurice D. Clarke, $3,000.00, three thousand dollars.

Thomas E. Burnham, $1,000.00, one thousand dollars.

William H. Moody, $1,000.00, one thousand dollars.

H. L. Dole, $2,000.00, two thousand dollars.

C. W. Morse 1501
by
B. B. Jones, $3,000.00, three thousand dollars.
C. Howard Poore
by
B. B. Jones, $2,000.00, two thousand dollars.
Byd. B. Jones, Trustee. $1,000.00. one thousand dollars.

Plaintiffs' Exhibit No. 3.

POWER OF ATTORNEY.

1502

PORTER, HOBSON AND MORSE
to
MORSE AND EGAN.

Know all men by these presents, that we, Dudley Porter, John L. Hobson and Charles W. Morse, all of Haverhill, in the County of Essex and Commonwealth of Massachusetts, do hereby constitute and appoint the said Charles W. Morse and John M. S. Egan, of Georgetown, Colorado, our true and lawful attorneys, for us, and in our names and stead, to accept and put on record proper deeds and instruments conveying to us, our heirs and assigns, good title to all those certain mining claims known as the "Good Hope" and "San Jacinto," and that certain mining location known as the "Annex," all being located in the Pinacate Mining District, County of Riverside and State of California, together with all the mills, boilers, engines, tracks, cars, silver plates and mining tools and equipments of any nature in, or appurtenant to, or used in connection with, said property; and thereupon in our name and behalf to execute, acknowledge and deliver a mortgage deed of said property to secure payment to the person or persons entitled thereto of the balance of the purchase money to be paid for said property, to wit, to secure payment to such person or

1503

persons of the sum of one hundred thousand dollars ($100,000) on the first day of July, 1894, and of the further sum of one hundred and fifty thousand dollars ($150,000) on the first day of January, 1895, provided, however (and this power of attorney shall not be valid or effectual to bind us if this condition be not complied with), that such mortgage shall be so expressed and framed that we shall not be personally or individually bound or liable to make said payments or any part thereof, and shall not warrant the title to the said property or any part thereof; but shall be so framed that the said property only, or our title thereto shall be bound for said payments, and provided also that said mortgage shall reserve the right to us and our heirs and assigns to retain possession of, mine said property and sell and receive pay for the ore and fully enjoy the possession and use and profits of said property until default in making said payments, or either of them.

And upon the conditions and under the limitations herein expressed, we do hereby for ourselves, our heirs and assigns, authorize and empower said Morse and Egan in our names and behalf, and as our attorneys aforesaid, to execute, acknowledge and deliver such mortgage, and to do all things relating to the premises as fully and effectually, under the limitations and upon the conditions aforesaid, as we could do if personally present.

In testimony whereof, we have hereunto set our hands and seals this twentieth day of December, A. D. 1893.

JOHN L. HOBSON, [SEAL.]
DUDLEY PORTER, [SEAL.]
CHARLES W. MORSE, [SEAL.]

Commonwealth of Massachusetts, } ss.: 1507
Essex, December 21, 1893. }

Then personally appeared the above-named Dudley Porter, John L. Hobson and Charles W. Morse, and acknowledged the foregoing to be their free act and deed.

Before me,

MELLEN A. PINGREE,

Notary Public.

I, WILLIAM H. GRIFFITH, have read this power of attorney and it is satisfactory to me. 1508

WILLIAM H. GRIFFIMH.

Plaintiffs' Exhibit No. 4.

The Ninety Thousand Dollar Check.

HAVERHILL, December 22nd, 1893.

MERRIMACK NATIONAL BANK.

Pay to the order of C. W. Morse and J. M. S. Egan Ninety Thousand Dollars. 1509

DUDLEY PORTER.

December 22nd, 1893.

Massachusetts.

Good when properly endorsed
"Merrimack Natl. Bank, Haverhill, Mass.,"
by

UBERT A. KILLIAM, *Cashier.*

Endorsed:

Pay to the order of J. M. Sigafus.
C. W. Morse,
J. M. S. Egan.

J. M. Sigafus.

1510 Pay to the order of
CHEMICAL NATIONAL BANK,
New York,
for collection for account of
FIRST NATIONAL BANK,
Riverside, California.

STANLEY J. CASTLEMAN, *Cashier.*

SECOND NATIONAL BANK.
Paid.
Haverhill, Mass.

1511

Plaintiffs' Exhibit No. 5.

The Sixty Thousand Dollar Check.

HAVERHILL, Mass., Dec. 22nd, 1893.
No. 1875.

THE FIRST NATIONAL BANK.

Pay to the order of C. W. Morse and J. M. S.
1512 Egan $60,000, Sixty thousand Dollars.

DUDLEY PORTER.

Certified December 22, 1893.
Good when properly endorsed.
FIRST NATL. BANK,
Haverhill, Mass.
C. E. DOLE, *Cashier.*

(Endorsements.)

Pay to the order of J. M. Sigafus.
C. W. Morse,
J. M. S. Egan.

J. M. Sigafus.

Pay to the order of the HANOVER NATL. BANK, 1513
New York,
For collection for account of
FIRST NATL. BANK,
Riverside, Cal.
With stamp on face:
FIRST NATL. BANK.
Paid.
Jan. 6, 1894.
Haverhill, Mass.

——— 1514

Plaintiffs' Exhibit No. 6.

Deed Good Hope Con. Gold Mining Co. to W. H. Griffith.

This indenture, made this 28th day of December, A. D. 1893, by and between the Good Hope Consolidated Gold Mining Company, a corporation duly organized under and by virtue of the laws of the State of California, whose principal place of business is at Pinacate, County of Riverside, State of California, party of the first part, and W. H. Grif- 1515
fith, of the City of Denver, State of Colorado, the party of the second part.

Witnesseth: That, whereas, the said party of the first part is a corporation duly incorporated and existing under and by virtue of the laws of the State of California, and in pursuance of the statutes, in such cases made and provided, has acquired and is the owner of those certain mines known and described as the Good Hope Consolidated Gold Lode Mining claim, consisting of the San Jacinto and Good Hope Quartz locations.

Also has acquired and is the owner of that certain mining claim known as the "Annex" situate,

lying and being in the Pinacate Mining District County of Riverside, State of California; and

Whereas, the Board of Directors of said corporation, duly assembled, duly passed the following resolution:

"It is resolved by the Board of Directors of the Good Hope Consolidated Gold Mining Company that James M. Sigafus, president of said Company be, and he is, hereby authorized, empowered and directed to execute and deliver to Mr. W. H. Griffith for, and on behalf of, said corporation, and as its act and deed, a conveyance of all the property of every name and nature owned or controlled by said corporation, on such terms as he may deem advisable; and to affix to such conveyance the corporate name and corporate seal of said Company."

Now, therefore, in pursuance of said resolution, and in consideration of the sum of five hundred thousand dollars, gold coin of the United States, paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part doth, by these presents, grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all those certain lands, mining claims and premises situate in Riverside County, State of California, and described as follows, to wit (conveying by description the property mentioned in Agreement, Exhibit No 1):

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part, his heirs and assigns forever.

Together with all mining tools, implements and all personal property now on said premises used in connection with said lands or in operating the same or any part thereof.

In witness whereof, the said party of the first part, by resolution of its Board of Directors, hath caused these presents to be subscribed by its pres-

ident, and its corporate name and seal to be hereunto affixed by its president, the day and year first above written. 1519

GOOD HOPE CONSOLIDATED GOLD
[CORPORATE SEAL.] MINING CO.

By JAMES M. SIGAFUS
President.

Attest:
O. P. TAYLOR,
Secretary pro tem.

Certificate of acknowledgment, December 28th, 1893, attached. 1520

Recorded December 30th, 1893, at ten o'clock and thirteen minutes A. M. at the request of O. P. Taylor, Riverside Co., California.

Plaintiffs' Exhibit No. 7.

Quit-claim deed, Sigafus to Griffith.

Quit-claim, James M. Sigafus to W. H. Griffith, dated December 28th, 1893. 1521

Acknowledged December 28th, 1893.

Recorded at the request of O. P. Taylor, December 30th, 1893, at 10 o'clock and fourteen minutes A. M., Riverside Co., California.

Quit-claims the property deeded in Plaintiffs' Exhibit No. 6.

1522 **Plaintiffs' Exhibit No. 8.**

Deed W. H. Griffith to Porter, Hobson and Morse.

This indenture, made this 28th day of December A. D., 1893, by and between W. H. Griffith, of the City of Denver, State of Colorado, the party of the first part, and Dudley Porter, John L. Hobson and Charles W. Morse of Haverhill, State of Massachusetts, the parties of the second part.

Witnesseth: That for, and in consideration of, the sum of five hundred thousand dollars, in hand paid by the said parties of the second part, the re-
1523 ceipt whereof is hereby acknowledged, the said party of the first part does hereby grant, bargain, sell and convey unto the said parties of the second part, and to their heirs and assigns forever, all those certain lots or parcels of land situate in the County of Riverside, State of California, and bounded and particularly described as follows, to wit:

(Conveys by description the property mentioned in Agreement, Plaintiffs' Exhibit No. 1 and the deed Plaintiffs' Exhibit No. 6).

Being the same property conveyed by the Good Hope Consolidated Gold Mining Company, a corporation, to W. H. Griffith, the grantor herein, on
1524 the 28th day of December, A. D. 1893.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and also all and singular, the tenements, hereditaments and aphurtenances thereto belonging, or in any way appertaining, and the rents, issues and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, their heirs and assigns forever.

Together with all mining tools and implements, and all personal property now upon said premises

used in connection with said mines, or in operating 1525
the same, or any part thereof.

In witness whereof, the said party of the first part has hereunto set his hand the day and year first above written.

W. H. GRIFFITH.

Certificate of acknowledgment, December 28th, 1893, attached.

Recorded December 30th, 1893, Riverside Co., California, at 10 o'clock and Sixteen minutes A. M., at the request of O. P. Taylor. 1526

Plaintiffs' Exhibit No. 9.

Quit-claim deed from J. Everett Bird and wife to Dudley Porter, John L Hobson and Charles W. Morse.

Dated January 2d, 1894.

Acknowledged January 2d, 1894, and recorded in Riverside Co., California, Jannary 4th, 1894, at the request of W. J. McIntyre.

Quit-claims the mining claim known as the 1527
"Annex" mentioned in contract, Plaintiffs' Exhibit No. 1, and deed, Plaintiffs' Exhibit No. 6.

Plaintiffs' Exhibit No. 10.

Mortgage W. H. Griffith to J. M. Sigafus.

This mortgage, made this 28th day of December, 1893, by W. H. Griffith, Mortgagor, to James M. Sigafus, Mortgagee.

Witnesseth, That the mortgagor mortgages to the mortgagee all that certain piece and parcel of

1528 land situate and being in the County of Riverside, State of California, and bounded and particularly described as follows, to wit: (Here follows description of mortgaged property, the same property described in Contract, Plaintiffs' Exhibit No. 1, and deed, Plaintiffs' Exhibit No. 6.)

As security for the payment to the said mortgagee of one hundred thousand dollars in gold coin of the United States of America, without interest, according to the terms of four certain promissory notes in the words and figures following, to wit:

1529 $82,000.

RIVERSIDE, CALIFORNIA, December 28, 1893.

On or before July 1st, 1894, after date, without grace, for value received, I promise to pay to James M. Sigafus or order the sum of eighty-two thousand dollars without interest.

W. H. GRIFFITH.

$6,000.

RIVERSIDE, CALIFORNIA, December 28, 1893.

On or before July 1st, 1894, after date, without grace, for value received, I promise to pay to James M. Sigafus or order, the sum of six thousand dol-
1530 lars without interest.

W. H. GRIFFITH.

$6,000.

RIVERSIDE, CALIFORNIA, December 28th, 1893.

On or before July 1st, 1894, after date, without grace, for value received, I promise to pay to James M. Sigafus, or order the sum of six thousand dollars, without interest.

W. H. GRIFFITH.

$6,000.

RIVERSIDE, CALIFORNIA, December 28, 1893.

On or before July 1st, 1894, after date, without grace, for value received, I promise to pay to James

M. Sigafus, or order, the sum of six thousand dol- 1531
lars, without interest.

W. H. GRIFFITH.

Provided, however that in case this mortgage is foreclosed, the same shall be wholly satisfied out of said property hereinbefore described, and no deficiency judgment shall be entered against said mortgagor.

In the event of a foreclosure of this mortgage reasonable attorney's fees shall be taxed by the Court and included and paid in the Bill of Costs.

In witness whereof, the said party of the first part has hereunto set his 1532
hand and seal the day and year first above written.

W. H. GRIFFITH. [SEAL.]

Signed and sealed in the presence of

O. P. TAYLOR.

Certificate of acknowledgment.

December 28th, 1893, attached.

Recorded in Riverside County, California, December 30th, 1893, at 10 o'clock and Fifteen minutes A. M., at the request of O. P. Taylor.

1533

Plaintiffs' Exhibit No. 11.

Mortgage, Porter, Hobson and Morse to Fillius, Griffith and ors.

This mortgage, made this 9th day of January, 1894, by Charles W. Morse, Dudley Porter and John L. Hobson, all of Haverhill, Massachusetts, Mortgagors, to Samuel F. Thompson, Charles M. Derrickson, William G. Graham, C. E. Whistler, Samuel B. Griffith and Caroline F. Griffith, of Mercer, Pennsylvania, and Jacob Fillius, of Denver, Colorado, Mortgagees.

1534 Witnesseth, That the mortgagors mortgage to the mortgagees all that certain piece and parcel of land situated and being in the County of Riverside, State of California, and bounded and particularly described as follows, to wit:

(Here follows description of mortgaged property, the same property described in contract, Plaintiffs' Exhibit No. 1, and deed, Plaintiffs' Exhibit No. 6).

As security for the payment to the respective mortgagees in gold coin of the United States of America, without interest, the amount of the indebtedness of the said mortgagors to the respective mortgagees, the amounts and terms of payment of
1535 which indebtedness are evidenced by seven certain promissory notes, which said promissory notes are respectively in the words and figures following, to wit: 1st.

$5,500.00.

LOS ANGELES, CAL., January 9th, 1894.

On or before January 1st, 1895, without grace, for value received, we, Charles W. Morse and Dudley Porter by John M. S. Egan and Charles W. Morse, his duly authorized attorneys in fact, and John L. Hobson by John M. S. Egan and Charles W. Morse, his duly authorized attorneys
1536 in fact, jointly and severally promise to pay to Samuel F. Thompson the sum of five thousand five hundred dollars in gold coin of the United States of America, without interest.

CHARLES W. MORSE.
DUDLEY PORTER,
by Charles W. Morse and John M. S. Egan, his duly authorized attorneys in fact.
JOHN L. HOBSON,
by Charles W. Morse and John M. S. Egan, his duly authorized attorneys in fact.

Here follows, notes set out at length in the mortgage, each of the same date and tenor and executed by the same parties in the same manner, and differing only in amounts and names of payers. They are as follows: 1537

Amount.	Payee.
$2,750.00	Charles M. Derickson.
1,375.00	William G. Graham.
1,375.00	C. E. Whistler.
3,000.00	Samuel B. Griffith.
3,000.00	Caroline F. Griffith.
108,000.00	Jacob Fillius.

Provided, however, that in case this mortgage is foreclosed, the same shall be wholly satisfied out of said property hereinbefore described and no deficiency judgment shall be entertained against any of said mortgagors. 1538

It is, however, covenanted and agreed that in the event of a suit or suits being instituted for the foreclosure of this mortgage to satisfy the indebtedness evidenced by the said promissory notes, or either of them, then there shall be included in any judgment or judgments of foreclosures reasonable attorney's fee or attorney's fees, which fee or fees shall be taxed by the Court and allowed to the plaintiff or plaintiffs in such suit or suits, the same to be satisfied out of the proceeds of any sale or sales of the property hereinbefore mortgaged, and in case any of said suit or suits shall be settled before judgment, a reasonable attorney's fee or fees shall be allowed to the plaintiff or plaintiffs in such suit or suits upon such compromise or settlement. 1539

In witness whereof, the said mortgagors, the said Charles W. Morse and the said Dudley Porter, by John M. S. Egan and Charles W. Morse, his duly authorized attorneys in fact, and the said John L. Hobson, by the said John M. S. Egan and Charles W. Morse, his duly author-

1540 ized attorneys in fact, have hereunto set their hands and seals the day and year first above written.

CHARLES W. MORSE [SEAL.]
DUDLEY PORTER [SEAL.]
By Charles W. Morse and John M. S. Egan, his duly authorized attorneys in fact.

JOHN L. HOBSON, [SEAL.]
By Charles W. Morse and John M. S. Egan, his duly authorized attorneys in fact.

1541

STATE OF CALIFORNIA, } ss.:
County of Riverside, }

On this ninth day of January, in the year one thousand eight hundred and ninety-four, before me, W. D. Devana, a notary public, in and for said county, residing therein, duly commissioned and sworn, personally appeared Charles W. Morse and John M. S. Egan, known to me to be the persons described in and whose names are subscribed to the within instrument as the attorneys in fact of Dudley Porter and John L. Hobson, and
1542 the said Charles W. Morse and John M. S. Egan acknowledged to me that they subscribed the names of Dudley Porter and John L. Hobson, thereunto as principals and their own names as attorneys in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office, in the County of Riverside, the day and year in this certificate first above written.

Notary [SEAL] Public.

W. D. DEVANA,
Notary Public,
In and for Riverside County,
State of California.

STATE OF CALIFORNIA, } ss.: 1543
County of Riverside, }

On this ninth day of January, in the year one thousand eight hundred and ninety-four, before me W. D. Devana, a notary public, in and for said County of Riverside, residing therein, duly commissioned and sworn, personally appeared Charles W. Morse, personally known to me to be the person described in, and whose name is subscribed to, and who executed, the within instrument, and he acknowledged to me that he executed the same freely and voluntarily.

In witness whereof, I have hereunto set my hand and affixed my official 1544
seal, at my office in Riverside, in said county, the day and year in this certificate first above written.

Notary [SEAL.]

W. D. DEVANA,
Notary Public,
In and for Riverside County,
State of California.

Endorsed:

Received for record, Feb. 15, 1894, at 26 minutes past 4 o'clock P. M., at the request of W. H. 1545
Griffith, recorded in book No. 7 of Mtges., page 266, *et seq.*, records of Riverside County, California.

E. H. GRUWELL.
Recorder.

1546 **Plaintiffs' Exhibit No. 13.**

(Letter Egan to Morse.)

PERRIS, RIVERSIDE CO., CALA.,
Nov. 18, 1893.

CHARLES W. MORSE, Esq.,
Haverhill, Mass.

My dear Sir:

I have just completed my third day's work here, and in a snow storm, for which the natives, of
1547 course, are apologizing.

Regarding the "Good Hope" mine, I am glad I came, as it really is a wonder. The reasons Griffith gave us at Denver for Sigafus' selling are absolutely true—his son-in-law, for whom he purchased it, is in a Keeley Cure institute at Los Gatos. Were you here, you could thoroughly understand the situation, and we daily wish you were here—I myself in particular. I should be loath to put the amount of gold in sight as high as the report I read, and I am testing it every ten feet and measuring the whole mine, and having mill runs made; but I believe firmly that, properly handled, the
1548 mine can return the purchase money in less than one year, and it will take three or four to work out the ore now in sight. I can conscientiously say that there is $600,000 or $700,000 ready to take out, and, by increasing mill capacity, a handsome dividend can be paid in one year, besides the purchase price. It is a gold mine of a thousand, admirably situated (but no orange groves in sight).

We must get hold of this property, for in a year it can be made worth a cool million by proper and energetic management. It will take me four or five days more to complete my examination, and I am making it very thorough and exhaustive; but we must plan a campaign at once, and if I can help East, I, of course, will do so. The price can stand

a good margin of profit and still be a gift, there- 1549
fore, please write me in a few days at Georgetown. If you see the Colonel, talk it over with him, but don't let him think that the value of the property is in 600 acres of land, covered with sage-brush, that might raise oranges by spending $100,000 to get water to them, but is in the mine, as the best gold proposition for the price I have ever seen.

Yours faithfully,

JOHN M. S. EGAN.

1550

Plaintiffs' Exhibit No. 14.

(Letter Egan to Roberts.)

GOOD HOPE MINE,

Nov. 19th, 1893.

CARSON A. ROBERTS,

Denver, Colo.

My dear Mr. Roberts:

1551
This is my fourth day at the mine, and it will take me till about the 26th to get a good mill run through under my supervision, though the record is excellent. When you write Col. Platt, tell him that we have found a mine at last. I believe the purchase price can be taken out in a year, and a handsome surplus besides. It is the biggest gold proposition I have ever seen, and enough ore in sight for several years' work. But *nothing* must absolutely be said *to a soul* in Denver about it. With best regards.

Sincerely yours,

JOHN M. S. EGAN.

1552 **Plaintiffs' Exhtbit No. 15.**

(Letter Egan to Morse.)

GOOD HOPE MINE,

NOV. 23, 1893.

C. W. MORSE, Esq.

My dear Sir:

I am now having 20 tons of ore that I have picked out from various portions of the mine run through the little trap they have here, and shall
1553 get through to morrow night. I have measured the ore bodies opened up and ready for stoping twice, as my first figures paralyzed me; but there is actually in sight nearly a million of dollars of gold, but ready to mill $797,000 worth. The gold is coarse, and, just as I told you in Denver, the mine seems made to order. You would have to be here on the ground to appreciate the situation, and unless you knew *all* the circumstances as I do, you would deem it incredible. All the mine needs is a 40-ton mill instead of a six-ton. Even with this it has paid from the grass roots, and paid a handsome dividend every month. Now, I telegraph you, as the matter must be pushed through as rapidly
1554 as possible. No stand-off nor talk will go with Sigafus; he wants to get away from here, and get his daughter and children East. The son in-law is in a Keeley institute at Los Gatos.

I hope to hear from you on my return to Denver on the 30th. The price is too low for the property, and we must get a big slice. It can be made worth $2,000,000 in two years. I never saw such a proposition for the money.

With best regards,

Yours sincerely,

JOHN M. S. EGAN.

Plaintiffs' Exhibit No. 16. 1555

(Letter Egan to Morse.)

GOOD HOPE MINE,
Perris, Riverside Co., California.

C. W. MORSE, Esq.,
Haverhill, Mass.

My dear Sir:

Before talking over the purchase price of this mine we must have a consultation. If you cannot come on to Denver, we will meet you at any point East you mention. Shall be in Denver by the 29th. Wire me or write by that date. The mine is a 1556 good one, with three times the bottom purchase price in sight, and pay from the word go. If any effort on earth can get the mine, we must get it.

Faithfully yours,

JOHN M. S. EGAN.

Plaintiffs' Exhibit No. 17.

(Telegram Egan to Morse.)

Nov. 29th, 1893. 1557

DENVER, COLO., 29.

CHARLES W. MORSE.

Matter of such great importance that if meeting can be arranged with Colonel. Must meet you—Will be in Chicago Monday morning, Boston or New York Tuesday evening. Arrange your own place and time, but wire me at once Georgetown.

JOHN M. S. EGAN

DENVER, COLO., Nov. 29th.

CHAS. W. MORSE.

Just arrived from California. Proposition so great any delay fatal. Griffith and I start East

1558 Saturday night. Arrange time and place of meeting with Colonel Platt. Wire result to Roberts immediately.

J. M. S. EGAN.

Plaintiffs' Exhibit No. 18.

(Letter Egan to Platt.)

GOOD HOPE MINE.

PERRIS, RIVERSIDE CO., CAL.,

1559 Nov. 21, 1893.

Hon. JAMES H. PLATT.

My dear Colonel:

My opinion in the report is now fully confirmed by my examination, now in its sixth day. It is the mine that we have been looking for for years. It is situated in a lot of low, rolling hills, covered with sage brush, 18 miles from Riverside, but location is very much secondary to the mine itself. It is a mine that can be worth a cool million or two of them in a year by vigorous and proper management, and pay big from the word go. The circumstances narrated by Mr. Griffith as causing
1560 the sale of the property are absolutely true. A man would only have to stay here a couple of days to see it. An only daughter, a mine purchased for a worthless son-in-law, who is in a Keeley institute, practically incurable, and the old man and his wife hatching in the house, and his other big properties in New Mexico shut down, as he cannot attend to them, and cannot or will not leave the mine to go to the dogs. The purchase price of the mine is in evidence in one stope alone. The gold is free and coarse. The mill is a very rattletrap. Runs six tons a day, yet clears for the whole proposition over $100 a day. I cannot describe in a letter or in a report the whole surroundings, but it is a bonanza—

absolutely—and the country around has future ca- 1561
pabilities in the way of mining that I never dreamt of, and I find them out more every day. The owner is peculiar, and a crank, and you have to take him in spells to find out what he knows; but of one thing rest assured, there is good reason for his selling, and it is an opportunity that comes but once in a lifetime.

Now another important point: not a word must be breathed by anybody in Denver regarding it—better give the impression that it is no good, or a horde of fellows would swoop down here and euchre us out, besides upsetting the old man. You must write me at once, or Griffiths to Denver, care 1562
of Roberts, and we must, united, make every effort that man can make to carry it through; and I think to take it up and carry it through it may be necessary for me to go East also, and I will make any sacrifice to carry this sale through. No small amount compared with the capital sum can be paid, as Sigafus can take it out himself. Unless this deal goes through the next one will take $750,000, and I am writing this in cold blood. But don't allow a word in Denver. I am having a mill-run made, and cannot leave till about the 26th. See Mr. Morse, and try and start the ball rolling—the report Roberts has is a good one, and I can fully
verify it until mine is made up. 1563

Faithfully yours,

JOHN M. S. EGAN.

P. S.—Don't give the price East until we can meet and consult, as it has never been placed at less than $400,000, and locally is held at $500,000.

On receipt of this, write or telegraph to Denver, as we shall be there by Wednesday, the 29th. We must meet somewhere to consult and arrange for a plan of campaign, and if not convenient for you to come to Denver with Mr. Morse, Girffith and I will go on East and meet you, but the game is worth the candle—well worth it.

J. M. S. E.

1564 **Plaintiffs' Exhibit No. 19.**

(Letter Egan to Roberts.)

Dear Mr. Roberts:

Please forward enclosed letter at once to Col. Platt, and tell him that we must make an appointment at once of place of meeting, either East, or Middle, or in Denver, for it is of the greatest importance. I shall be in Denver by the 30th, and must have some word direct from the Colonel and Mr. Morse. He, Mr. Griffith, and I must meet at once; the only detail is place and time of meeting, and this I know that you can arrange, and can rely
1565 on your doing so.

With best regards,

Sincerely yours,

JOHN M. S. EGAN.

P. S.—Mum's the word.

Plaintiffs' Exhibit No. 20.

1566 HAVERHILL, MASS., Feb. 24th, 1894.

We hereby request the Good Hope Mining Company, in consideration of the conveyances to it made by Dudley Porter, John L. Hobson and Charles W. Morse, and by said Morse to issue to the following persons respectively the number of shares of the capital stock of the Good Hope Mining Company set opposite their several and respective names—that is to say:

Name.	Number of Shares.	Par Value.
Dudley Porter,	Seventy-five thousand,	$75,000 00
Charles W. Morse,	One hundred and fifty thousand,	150,000 00
John M. S. Egan,	Fifty thousand,	50,000 00
John L. Hobson,	Seventy-five thousand,	75,000 00

Elbridge G. Wood,	Seventy-five thousand,	75,000 00
Boyd B. Jones,	Fifty-five thousand,	55,000 00 1567
Charles E. Wiggin,	Twenty-five thousand,	25,000 00
D. T. Kennedy,	Twenty-five thousand,	25,000 00
Thomas S. Ruddock,	Twenty-five thousand,	25,000 00
Austin E. Ruddock,	Twenty-five thousand,	25,000 00
George H. Carleton,	Forty thousand,	40,000 00
W. H. Moody,	Seventeen thousand five hundred,	17,500 00
H. E. Bartlett,	Twelve thousand five hundred,	12,500 00
H. L. Dole,	Fifteen thousand,	15,000 00
J. Otis Wardwell,	Fifteen thousand,	15,000 00
F. E. Hutchinson,	Twenty-five thousand,	25,000 00
John J. Winn,	Twelve thousand five hundred,	12,500 00
H. B. Newton,	Twenty-five thousand,	25,000 00
George D. Morse,	Five thousand,	5,000 00 1568
W. H. Floyd,	Twenty-five thousand,	25,000 00
Enoch H. Howes,	Ten thousand,	10,000 00
Mellen A. Pingree,	Ten thousand,	10,000 00
George C. Howe,	Five thousand,	5,000 00
Charles H. Poor,	Five thousand,	5,000 00
Kelly Bros.,	Twenty-five thousand,	25,000 00
E. B. George,	Five thousand,	5,000 00
George W. Gilbert,	Twelve thousand five hundred,	12,500 00
James F. West,	Five thousand,	5,000 00
Howard H. Gage,	Five thousand,	5,000 00
Maurice D. Clarke,	Fifteen thousand,	15,000 00
Thomas E. Burnham,	Five thousand,	5,000 00
Porter, Hobson & Morse,	One Hundred and Twenty-five thousand,	125,000 00

1569

DUDLEY PORTER,
JOHN L. HOBSON,
BOYD B. JONES,
ELBRIDGE G. WOOD,
MELLEN A. PINGREE,
THOMAS S. RUDDOCK,
CHARLES W. MORSE.

1570 **Plaintiffs' Exhibit No. 21.**

(Deed, Porter, Hobson & Morse, to Good Hope Mining Co.).

THIS INDENTURE, made this 24th day of February, A. D. 1894, between Dudley Porter, John L. Hobson and Charles W. Morse, all of Haverhill, in the County of Essex, and Commonwealth of Massachusetts, parties of the first part, and the Good Hope Mining Company, a corporation duly organized under the laws of the State of Maine, at Portland, in the State of Maine, party of the second part:

1571 Witnesseth: That the parties of the first part, at the request of Elbridge G. Wood, Boyd B. Jones, Thomas S. Ruddock and Mellen A. Pingree, all of said Haverhill, and in consideration of the issue of the entire capital stock of said Corporation by the party of the second part to them, the said parties of the first part, and to said Wood, Jones, Ruddock and Pingree, and to certain persons designated by the parties of the first part, and by the said Wood, Jones, Ruddock and Pingree, have remised, released and forever quit-claimed, and by these presents do remise, release and for ever quit claim unto the said party of the second part, and its

1572 successors and assigns, all those certain lots, pieces or parcels of land situate, lying and being in the County of Riverside, and State of California, and bounded and particularly described as follows to wit:

(Conveys by description the property mentioned in contract, Plaintiffs' Exhibit No. 1, and deed, Plaintiffs' Exhibit No. 6).

Being the same property conveyed to said parties of the first part by W. H. Griffith by his deed dated the 28th day of December, A. D. 1893, and recorded in Book No. 10 of Deeds, page 28, *et seq.*, records of said County of Riverside.

Together with all dips, spurs and angles, and

also all the metals, ores, gold and silver-bearing 1573
quartz, rock and earth therein; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues and profits thereof.

Together with all mining tools and implements and all personal property now upon said premises used in connection with said mines, or in operating the same, or any part thereof.

The property hereby conveyed is subject to mortgages amounting to two hundred and twenty-five thousand dollars.

To have and to hold all and singular the said premises, together with the appurtenances 1574
and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHARLES W. MORSE. [SEAL].
JOHN L. HOBSON. [SEAL].
DUDLEY PORTER. [SEAL].

Acknowledged the 26th day of February, 1894, 1575
and recorded March 30th, 1894, at 10 o'clock and 25 minutes A. M., at the request of W. J. McIntyre, in Riverside Co., Cal.

Plaintiffs' Exhibit No. 22.

(Agreement, James M. Sigafus and J. Everett Bird with William H. Griffith, July 5, 1893).

This agreement, made this 5th day of July, A. D. 1893, by and between James M. Sigafus, of Riverside County, State of California, and J.

1576 Everett Bird, of Los Angeles, California, parties of the first part, and William H. Griffith, agent, of the City of Denver, State of Colorado, the party of the second part.

Witnesseth, That in consideration of the premises, the parties of the first part hereby agree to sell, assign, set over, transfer and convey to the party of the second part, his heirs, administrators and assigns, the following property, to wit:

All the capital stock of the Good Hope Consolidated Gold Mining Company.

1577 All that certain mining claim situated near the Good Hope Mine, known as the "Annex Mining Claim." Also six hundred (600) acres of land, situated in said county of Riverside, aforesaid, and being the same land purchased by said James M. Sigafus from the Southern Pacific Railroad Company, and being more fully described in said contract between said James M. Sigafus and said Southern Pacific Railroad Company.

The purchase price of said property is the sum of two hundred and thirty thousand dollars, which shall be paid by the said party of the second part, his heirs, administrators and assigns, in installments as follows, to wit:

1578 Fifty thousand dollars on or before the 1st day of September A. D. 1893.

One hundred and eighty thousand dollars on or before the first day of December, A. D. 1893.

Said sum shall be paid for the use or benefit of the said parties of the first part, their heirs, administrators and assigns, at the First National Bank of the City of Riverside, State of California.

Upon payment of the said sum of five thousand dollars on or before the first day of September, A. D. 1893, the parties of the first part, their heirs, administrators and assigns, shall assign all the capital stock of the above-mentioned "Good Hope

Consolidated Mining Co." to the said party of the 1579
second part, his heirs, administrators and assigns, and shall also convey by deed, free of all incumbrance to said party of the second part, his heirs, administrators and assigns, the above-mentioned "Annex Mining Claim" and the above-mentioned six hundred acres of land, which said stock and deed shall be deposited in said First National Bank of Riverside, in escrow, to be delivered to said party of the second part, his heirs, administrators and assigns upon the said party of the second part, his heirs, administrators and assigns, fulfilling the terms of this contract.

It is further stipulated and agreed on the part of 1580
the said parties of the first part, their heirs, administrators and assigns, that all of the above-mentioned property, real and personal, shall be free and clear of all incumbrances whatsoever, at the time said property is transferred and assigned to said party of the second part, his heirs, administrators and assigns.

In witness whereof, the said parties above mentioned have hereunto set their hands and seals the day and year first above written.

JAMES M. SIGAFUS, [SEAL.] 1581
J. EVERETT BIRD,
by J. M. S., [SEAL.]
W. H. GRIFFITH, [SEAL.]
Agent.

Plaintiffs' Exhibit No. 23.

Agreement, James M. Sigafus, with W. H. Griffith, Aug. 24, '93.

This agreement, made and entered into this twenty-fourth day of August, one thousand eight hundred and ninety-three, by and between James

M. Sigafus, of the County of Riverside, State of California, the party of the first part, and W. H. Griffith, of the City of Denver, State of Colorado, the party of the second part:

Whereas, there is a certain contract in existence between said Sigafus, *et al.*, of the one part, and said Griffith of the other part, dated July 5th, 1893, for the sale of the capital stock of the Good Hope Consolidated Mining Company, and also for the sale of certain mining property and real estate; and

Whereas, time is not the essence of said contract, and according to legal opinions the said Griffith would have a right to perform the covenants of said contract even if the payment stated in said contract had become due.

Now, this agreement witnesseth: That for a valuable consideration and the further consideration of the said Griffith agreeing to make time the essence of said above-mentioned contract, bearing date the 5th day of July, 1893, the said James M. Sigafus hereby agrees and binds himself, his heirs, administrators and assigns, to sell, convey, assign and transfer to said W. H. Griffith all the property mentioned in said contract of July 5th, 1893, in consideration of which the said Griffith hereby agrees and binds himself, his heirs, administrators and assigns to pay said James M. Sigafus the sum of two hundred and thirty thousand dollars ($230,000.00), on or before the first day of January, A. D. 1894.

Upon the receipt of the said $230,000.00 the said James M. Sigafus agrees and binds himself, his heirs, administrators and assigns, to transfer all of the property mentioned in said contract, dated July 5th, 1893, to said W. H. Griffith, his heirs, administrators or assigns, free and clear of any and all incumbrances whatsoever.

Provided, however, that the said James M. Sigafus shall have the right and privilege, at any time,

before the said first of January, 1894, to sell the property mentioned in said contract at a price not less than $230,000.00, of which amount the sum of $115,000.00 is to be paid in cash within thirty days (30) after said sale, and the said Sigafus is not to have privilege of making such sale except upon said terms. 1585

In case said Sigafus should make said sale, then and in that case, he hereby agrees and binds himself, his heirs, administrators or assigns, to pay said W. H. Griffith, his heirs, administrators and assigns the sum of $5,000.00, said amount to be paid said Griffith by said Sigafus out of the cash payment received by said Sigafus on said mine. 1586

It is further stipulated and agreed, that said Griffith shall go immediately to New Orleans, and endeavor as agent for said Sigafus, to sell said property for the sum of $350,000.00, to parties represented by Ed. Enderle, of New Orleans, or such other price as said Sigafus may authorize said Griffith to accept.

The terms of payment of said $350,000.00 to be as said Sigafus may authorize said Griffith to accept,

In case said Griffith makes said sale, said Sigafus hereby agrees and binds himself, his heirs, administrators and assigns, to pay said Griffith, his heirs, administrators and assigns, ten per cent. of the purchase price; said commission to be paid; ten per cent. out of each payment for said property. Said Griffith is to pay all the expense of said trip to New Orleans and all expense incident to his effort to sell said mine. 1587

In witness whereof, the parties have hereunto set their hands and seals the day and year above written.

JAMES M. SIGAFUS, [SEAL.]
W. H. GRIFFITH, [SEAL.]

1588 **Plaintiffs' Exhibit No. 24.**

Package of reports of receipts and expenditures of Good Hope Mine.

June, 1894 to May, 1895. Summary of material parts of which appear elsewhere.

(See Plaintiffs' Exhibit 25).

Plaintiffs' Exhibit No. 25.

1589

Summary of reports showing permanent improvement accounts.

Bldgs., &c.,	$1,871 23
Machinery,	2,299 35
Assay supplies,	731 42
Surveying,	535 00
Water supply, pipe and labor,	4,527 87
Pipe and fittings,	111 58
New hoist,	1,120 85
Insurance,	1,141 72
Legal expenses,	1,272 00
Travelling exp.,	106 28
1590	
	$14,017 27
Sent down in cash,	1,500 00
Didn't come out of bullion,	$12,517 27

Egan until Dec. 11, 1894.

Foster, Dec. 11, 1894, to March 5, 1895.

Willson, March 5, 1895 to Receivership, May 22, 1895.

Total bullion, Jan. 1, 1894, to Receivership,	$98,757 40
" disbursements,	108,445 50
Bullion Jan. 1, 1894, to June 1, 1894,	14,503 82

Disbursements, same time.

Tonnage, June 1, 1894, to Rec'ship at 3 cars to ton,	7,587		1591
Bullion, same time,		84,253 58	
Exp. " "		81,177 70	
Value per ton,		11 10	
Cost per ton,		10 77	

Egan, June 1, 1894, to Dec. 1, 1894,

Tonnage, 3 cars to ton,	4,762		
Bullion,		50,568 74	
Expense,		47,885 54	
Value per ton,		10 61	1592
Cost per ton,		10 05	

Foster, Dec. '94 to March 5, '95.

Tonnage,	1,601	
Bullion,	18,074 89	
Cost,	18,088 51	
Value per ton,	11 29	
Cost per ton,	11 30	

Wilson, March to Receivership, May, '95.

Tonnage,	1,224		1593
Bullion,		15,609 95	
Expense,		15,203 65	
Value per ton,		12 75	
Cost per ton,		12 42	

1594

Plaintiffs' Exhibit No. 26.

SUMMARY OF BULLION RETURNS

of

FOSTER AND EGAN PERIODS.

Date. 1894.	Amt.	Date. 1894.	Amt.	Date. 1895.	Amt.
Jan. 24.	$1,898.85	Brot. up.	$53,375.09	Brot. up.	$90,225.82
Feb. 8.	1,198.17	Oct. 13.	1,135.42	Apl. 11.	3,252.46
Feb. 21.	1,022.21	Oct. 22.	1,395.17	Apl. 20.	1,117.11
Mch. 17.	1,646.25	Oct. 29.	1,413.43	Apl. 26.	842.94
1595 Mch. 24.	1,293.76	Nov. 9.	2,290.94	May 9.	1,329.22
Apl. 5.	1,081.52	Nov. 19.	1,449.65	May 17.	832.98
Apl. 21.	1,471.35	Nov. 24.	996.34	May 31.	1,156.87
May 4.	1,393.43	Dec. 7.	2,935.06		$98,757.40
May 14.	891.91	Dec. 11.	81.46		
				1894.	
May 23.	752.90	Dec. 14.	874.26	Dec. 22.	5.00
				1895.	
June 4.	1,853.47	Dec. 21.	1,388.75	May 24.	30.00
June 15.	2,628.06	Dec. 27.	1,721.30		$35.00
					$98,792.40
		1895.			
1596 June 22.	$2,728.74	Jan. 9.	2,189.74	The $35.00 represents	
June 27.	$2,902.87	Jan. 10.	696.33	amounts received of	
July 12.	5,354.25	Jan. 17.	1,094.93	Mr. Weeks for priv-	
July 16.	4,789.28	Jan. 25.	1,415.68	ilege of working	
July 23.	3,999.11	Feb. 9.	3,272.29	over debris in Old	
July 30.	2,272.12	Feb. 13.	1,498.44	Mill, $30.00, and	
Aug. 6.	2,560.96	Feb. 21.	975.76	above it $5.00.	
Aug. 13.	2,065.69	Feb. 28.	1,454.64	Bullion, May 31, not	
Aug. 22.	2,662.93	Mch. 9.	2,088.47	deposited at Bank,	
Aug. 29.	1,992.48	Mch. 14.	1,806.61	see cash-book that	
Sept. 11.	2,252.38	Mch. 21.	1,848.53	date.	
Oct. 6.	2,662.40	Mch. 28.	2,827.53		
Forward,	$53,375.09	Frd.,	$90,225.82		

Plaintiffs' Exhibit No. 27.

1597

U. S. Mint Returns, 52 in number. Summary of which appears elsewhere. Exhibit No. 26.

Plaintiffs' Exhibit No. 29.

Letter, Cheatham to Doran, August 22, 1895.

RIVERSIDE, 8/22, 1895.

Dear Jim: 1598

I came over to Riverside to-day. I found out from McIntyre that Sigafus had gone back to N. Y. on some important business. He thinks he will be back soon. McIntyre told me he was going up next week to take your deposition. I did not say anything to him, because I did not know whether it would do. Suppose you talk to him and, if you think it advisable, you can write to me and I will tell him to get out there the day before and give you a chance so you can get rested for the next day. I told McIntyre that I thought Sigafus ought to of given you something for your services, and he said if you had not made that bad break you did in 1599 bringing that lawsuit, that Sigafus would of remembered you, but your nasty and ill-advised action made Sigafus mad. Write me at once and I will go into Riverside and tell McIntyre to go up the day before, that you want a talk with him. I think you would be able to make a settlement through him. Jim, I would like to see you get something, for you deserve it. Direct your letter to Perris.

Your friend,

J. R. CHEATHAM.

1600 **Plaintiffs' Exhibit No. 30.**

This is an exact copy or duplicate original of Plaintiffs' Exhibit No. 22, printed above.

Plaintiffs' Exhibit No. 31.

Letter, James M. Sigafus to James B. Doran.

GOOD HOPE CONSOL'D GOLD MINING CO.,
Pinacale, California,

1601 NORTH HOMESTAKE GOLD MINING COMPANY,
White Oaks, N. M.

JAMES M. SIGAFUS, President.
J. EVERETT BIRD, Secretary.

Nov. 7th, 1890.

JAMES B. DORAN, Esq.

Dear Sir:

I have not received the pay-roll to-night, but will send check for what I think the pay-roll will be. I will average the contractors at 200 each; whether it is more or less, pay them the two hundred. That is, if there is enough ground broke up
1602 to the date of receipt of the check. But don't overpay them, as they might leave the work as soon as they got more than was coming to them. You will understand what I mean. If there is two hundred due up to the date of receiving this, then pay them the two hundred. If not, it might be well to hold it, unless you knew that the men would do the work. I wrote you to-day from New York about paying not more than regular wages for the present. All I can say is to do the best you can. Don't try to do anything in the bottom and keep the drifts agoing as well as you can, and where there is a good ore shoot, be sure and have it timbered so that you can show it to good advantage should this man Keyes come down to look it over.

I am willing to let you and your friend bring it 1603
to the attention of any one you may see fit, and all I want is a fair price for the mine. Should a sale be arranged you might as well get a good thing as some one that knows nothing about a mine, and more particularly this one. Write what become of the pay-roll.

Goodby, with best wishes to all.

Respectfully yours,

JAMES M. SIGAFUS.

1604

Plaintiffs' Exhibit No. 32.

Letter, James M. Sigafus to Doran.

GOOD HOPE CONS'L'D GOLD MINING CO.,
Pinacale, California.

NORTH HOMESTEAD GOLD MINING CO.,
White Oaks, N. M.

JAMES M. SIGAFUS, President.
J. EVERETT BIRD, Secretary.

Nov. 21st, 1890.

JAMES B. DORAN, Esq. 1605

Dear Sir:

Yours received in which you complain of Watts. I wrote you several days ago that he might stop at any time, and we could prospect for the vein, as I think that this drift is off of the vein, and I think we are to fall to the west, and to drive a cross cut in the east, we may find ore, and still it may be that the drift is under it and it lays to the west of you. But if Watts' contract is given up, don't let it again, but cross cut to be sure that you are on the right vein, and then we will let this drift rest for a while, and do nothing except to make the up raise for air for the north No. 2 drift, and only

1606 drive that one for the winter and put both north and south drifts in shape to commence stoping. We will stope out the ore body that the shaft went through, commencing at the shaft and go up on them to drift No. 1 and take out the ore clean, as we go up and out each way, as far as there is any ore. This ore I want to mill this winter that lays between No. 1 and No. 2 and do as little stoping on No. 1 as possible and only mill what comes out of this drift No. 1 from the driving ahead, unless there is not ore below to be got. In your letter of the 12 you speak of your friend coming down about the middle
1607 of next month, and I wish that you can show him the mine to good advantage—that is, the ore body that is good. South drift at 100 & 108 feet is very good, and the North No. 1 is good. In many places, and, in fact, all the way from the shaft. I will get the assay of the two last samples from No. 1, North, to day or to-morrow. It may not assay as well as the other ore that come from the same drift at 155 and 175 feet in they run 80 60/100. Now, whether these men want to buy or not, what I want is to have a good report go out from the mine, and if you will be careful and show the best, and give them nothing but good samples, it may go a
1608 good ways towards bringing the property before the public, and San Francisco is the best city to advertise a mine in. It will be of advantage to give them the good side now, as it will cause them to think more about it, and when it comes to making a thorough examination, we can have the mine in proper shape. Now it is not, but still a mining man can see that himself. For all we are now doing is to drift straight ahead. You see if we stoped on any of these rich pockets we might find very large bodies of rich ore, and there is not the least doubt but that there is very large and rich pockets both above and below No. 1, both sides of the shaft. The pocket that was taken out in the old work is not the only big rich one there is in the

mine. There is many others larger and better than 1609
that one. There must be a good one in Moer's old work to the North, and how many are there between the present work and that no one can tell, but we find them in the drift as we go North, and, as you know, there is one of the best pockets in the shaft you sunk last year at 110 feet; then the gold is coarser than any we have ever found in any of the workings. I have some here on my desk that is coarser than any I have seen from the mine. With all of these, and what we are finding, it seems to me that it will give your friend a good opinion of the mine. Remember that he is not to expert it, but only to go through and see what we have 1610
done and are a doing, and can have all the samples he wishes to take away. You select them. Don't make a mistake but know where the ore is fair, and let him get an average lot of samples only, and be sure and show him the cropping close to the coal been, both of them, the one that Walter cut in digging out behind the been and the one further west; the one further west is No. 1; it is small but rich. You remember seeing me pan some of it. Be sure and call his attention to this, and also that it goes down 300 feet in the shaft, and he also can take samples from both the top and bottom. In this case, tell him that the shaft is over the vein for 200 1611
feet, which you can show him. I don't think that I would take him in North No. 2 this time, as the drift is not in ore, or has not been. I think we are off of the vein, and when we find it then it is time to examine it. It may be we are below the large ore body and are drifting in the broken vein, the same as the shaft was sunk in, and the large ore body is overhead, the same as in shaft No. 2, south, is rich, and as you are about under the rich ore that you find in No. 1, south, it must be that it continues all the way up to No. 1, south, and from there up to where ore was taken out from the old Mexican shaft 112 feet south of the shaft. Don't it look so to you? At any rate, take him down the

1612 shaft and sample the ore between No. 1 & No. 2 in the shaft, and then in the stope close to the shaft, and then again on top in these two veins. Then take him in South No. 2 at 108, or thereabouts, and take several samples from where you know it is good. Then take him in South No. 2, and take several samples from this drift, but know from panning that it will be a fair average ore. Then take him in No. 1, North, and give him samples from there. There is very good ore at 73 feet from shaft, and you know the other places. You may also take him in the South shaft, if you should think it best to, but there is nothing there to show.
1613 It might not interest him much; and then if they wish to make an examination of the mine they will have to wait till I come out, as it is not now in any shape to be examined. This you can tell him, if he asks you about it, or say that you will ask permission of me and give him an answer. I don't expect to sell to them, but still they might take it, but I want to have a good impression go out regarding the property; take him over to Mores old works and show him there what has been done, and see if you can find any samples like we found there, and give him to understand that No. 1, north, is to be driven north to cut this ore vein be-
1614 fore the work is stopped. The old workings is but 100 or 110 feet deep, and we will go under it at least 140 feet, besides developing the claim for 1,500 feet along the line at 250 feet deep.

I write this so that you can be ready for him should he come down to look it over, and if he or anyone else wants to buy the mine, to stock or work, this is one of the best gold mines that I know of now in my travels through the mining regions. But remember, and give him to understand, that it will take quite a little good talking to make me sell. I have parties here that wants to handle this mine, but if you can do anything with these men you might just as well make a commission, as these men have never wet their feet in a

mine in their lives, and if they don't want it, then 1615
it will be time to talk with them. One of the parties here you know of; that is Roberts. Him and George Dailey worked together in California and Colorado. Will write again. Goodby.

Yours respectfully,

JAMES M. SIGAFUS.

Plaintiffs' Exhibit No. 33.

1616
MINING REPORT GOOD HOPE GOLD MINE.

LOCATION.

Pinacate Mining District, San Diego County, California, four miles west of Perris, on the A. T. and S. Fe R. R., Section 15, Township 5, Range 4, West San Bernardino meridian.

NUMBER OF CLAIMS.

Two claims, 2,500 ft. x 600 ft. held by U S. patent, and one claim held by location. In addition there are 600 acres of good land covered by R. R. 1617
title. This being on an earned grant is practically the same as being patented (see map of Surface Claims No. 1).

HISTORY.

The small arroyos leading from the Good Hope ledge, were worked for placer gold prior to 1874, but as none of the arroyos furnished gold above a certain N. E. and S. W. line, the miners were led to begin a systematic search for the hidden ledge.

The Good Hope is practically a blind lead, being some distance from the mountains, and only uncov ered by trenching through the soil to the solid

formation. This was done in many places, and finally in 1874, the true vein was found. The first locators were Mexicans and a Frenchman by name of Mache. They found the vein in numerous places along its course, and worked the ore in arrastras for several years. These arrastras can still be seen down the arroyo from the present mill, though the grade of ore worked can only be estimated by a few scattered heaps of quartz which have been left around the arrastras and assay from $5 to $35 per ton. The property next passed into the hands of Messrs. Moore, Van Slyck and Barber. At this time most of the old work at North End (see map) was done, a five-stamp mill was erected, and finally the two claims were consolidated, making the present length of ground patented 2,500 ft. The production from these old workings cannot be accurately stated, but by careful inquiry from disinterested parties, and from the banker who shipped most of the bullion, I am informed that $260,000 has been produced.

This amount does not conflict with the quality of quartz left, or the size of the old dumps still in sight. The two old workings are 1,000 ft. apart, and the evidence of their bullion production is most valuable, as showing the remarkable length of the ore shoots. At no place up to this time had a greater depth than 110 ft. been reached, mainly on account of water, the poor facilities for hoisting (horse whim), and the custom of spending all the money taken from a stope before doing any dead work.

The present owner, Mr. J. M. Sigafus, purchased the property two years ago, settled the titles, and commenced a systematic exploration of the vein between the two old workings, and with what success can be learned from a perusal of this report.

Geology and Description of Vein.

The Good Hope is a fissure vein, with slight or

no variation from a N. E. and S. W. trend. It has 1621
a dip to the N. W. of 60 degrees, and a width between walls of from three to ten feet. The wall rocks and immediate formation are syenitic granite, and the fill between the walls is talc and granite, more or less decomposed and mixed with quartz, and a well-defined pay streak of quartz varying from one to four feet in width, often of a banded structure, and usually laying on the foot wall.

The walls are firm and hard, the foot wall occasionally making a wave or depression at which points the pay streak is usually very wide, or consists of two streaks of good size and richness (easily 1622
be seen by reference to photo No. 1).

Parallel with the vein on the northwest side is a belt of porphyry from 10 to 30 feet wide, which can be traced over a mile, and is distant from the vein from 50 to 100 feet. As near as could be ascertained this belt has a dip in the same direction as the vein, but at about 15° nearer vertical.

The general formation of the surrounding country is granite, crossed at intervals by irregular belts of syenite having no distinct demarkation between it and the granite.

There are numerous veins in this district, many of which have produced fairly well, though as far 1623
as I could learn, none have been worked to a greater depth than 100 feet.

The altitude of the camp is 2,000 feet.

Mining and Milling.

This vein is an exceptionally easy one to mine, requiring only small timbers, and the rock breaking well. Contracts are now in progress on the mine to drive drifts 300 feet and put rock in skip for $2.75 per foot, timber amounting to less than $1, making average cost of development work in drifts $3.75 per foot. Shaft 2 was let by contract

1624 and is well timbered with 6 x 6 Oregon pine—cost $15 per foot.

The amount of water from all workings is 10,000 gallons per day. The cost of coal is $2.25 per ton, delivered, and this cost could be reduced if taken in larger quantity, as the coal mines are only eight miles west. Labor, underground, $2.50 per day. Top men and car men $40 per month and board. In all estimates made, $4 per ton has been deducted for mining and milling, but a more systematic method would reduce this 26% at least.

In regard to the workings of the mill little information of value could be gained for the follow-
1625 ing reasons:

The ore is dumped into mill without weighing, each car supposed to hold 1,200 lb., but as many of the cars are not full and some go in without tally, it is but guess work at best. There is but one vanner with the mill and it is not used at all, as the mine is not furnishing water enough.

The mill man concentrates what he can with a gold pan and the result is astonishing as to value, but he has no idea how many tons of ore one ton of the concentrates represents.

The mill runs about nine hours per day and
1626 crushes supposedly ten tons, getting its steam from the boiler at shaft 2, the management supposing it economy to run only day shift in mine and mill. The talings from the last two months' run, assay $8 per ton, and the concentrates assay $1,503 gold, 15 oz. silver.

There has been cleaned up from mill $10,000 in bullion in its two months' run. The hoist on shaft 2 is now only being run and all ore hoisted from this point (see photo No. 2 hoist on shaft 1, photo 3; hoist on shaft 3, photo 4).

The ore bins at mill are very inadequate and the extra ore is dumped at end of tramways, sacked, put on wheelbarrow and then carried by hand up the steps of the mill and put through the crusher.

Many such instances of the slowness of the manage- 1627
ment can be seen at a glance.

PLANT AT MINE,

Consists of one Bryan mill with a crushing capacity equal to 15 stamps and equipment of Automatic Challenge Feed engine and boilers 40 h. p., all new (having been in use only two months).

Three self-dumping cars, each 4x2x2.

Three ore and water skips, each 2x2x6.

Two Lidgerwood hoists, capacity 1,000 ft., with ⅝-inch cable.

Hoisting power 32,000 lbs., vertical lift; 600 ft. 1628
steel cable.

Suitable buildings covering hoists, with 25-foot gallous frames.

One low-pressure Hooker pump, 4-in. stroke.

Steam cylinder, 6-in.

Water by 4-in., 100 foot lift.

One Cameron horizontal pump, lift 300 feet.

800 ft. 2-in. water and steam pipes in mine.

250 ft. 2-in. water pipe to mill.

1,500 feet water pipe from spring to private residence and boarding house.

One 2,500 gal. galvanized water tank. 1629

One 300 gal. galvanized water tank.

250 feet of tramway connecting hoist in shaft 2 with mill.

1,670 feet of steel rails in mine and tramway.

One four-roomed office and assay rooms with needful outfit for assaying and melting.

Barns, boarding house, dormitory.

A fine $10,000 residence (see photos).

[Photo. residence.]

GENERAL DEVELOPMENT.

It will be seen by reference to map No. 1 that the developments on this vein are extensive, but the

1630 actual number of feet that can be explored at present is confined to the work done in the last two years by the present owner. The shafts at north and being marked on map as given by the men who worked in them and from the surface measurements. A reference to photo No. 5 will show the dumps from these workings to be very large and to corroborate the statements of men.

The number of feet developed by present owner is 2,000 and can be seen by reference to map No. 2. Depth attained, 416 feet; continuous development on ore shoot as per map No. 1, 609 feet.

1631 DETAILS OF BLOCK 1.

It will be noticed in Blk. 1 and 2 that for a depth of over 200 ft. in shaft 2 no samples are taken (map 2). The first 200 ft. of this working shaft was let by contract and the owner was East from the day the contract was let until the completion of the work. The contractor started in on the hanging wall of the fissure on only a small stringer of quartz a few inches wide, which I considered of no commercial value and did not sample. The rock used as a foot wall to the shaft is mostly decomposed and gangue matter, the same as we find in all other parts of the mine, as a fill between the quartz
1632 streaks or the quartz streak and the hanging wall.

Immediately on the return of the owner this gangue was crossed and the true pay streak, 15 in. wide and assaying $76.47, was struck, as per map. Furthermore, when grading a coal bin for the hoist on shaft 2, the same streak was crossed and assays $20.67, width 9 inches.

In addition, another vein was crossed 20 ft. S. E., 14 inches wide, assaying $19.63, and as yet unexplored. In shaft No. 3, as far down as could be reached on account of water, the vein is 16 in. wide, well defined and assays $16. And as after striking the real pay streak at the depth of 200 ft., and having it through all other workings of mine as per

cut, I have not deducted from Blks. 1-2 as large a 1633
quantity of ore as would have been done if there was no indication of the vein being under the gangue used as a foot wall.

I here attach photograph taken from upraise 150 north of Shaft 2, which shows the width of fissure, the different pay streaks, and the upper one which was followed in sinking shaft 2.

[Photo]

DETAILED DESCRIPTION OF ORE BODY AND THE MANNER OF MAKING ESTIMATES.

1634

Block 1.

Following closely the working map No. 2 there is in Block 1, beginning at face of first level north twenty-nine assays taken clear across the vein in even quantity, and measured at exactly the points sampled, giving as a result an average of $23.29 and an average width of 18 inches, allowing 12 cu. ft. quartz in place per ton:

Dimensions of block,	333 ft. x210 ft.
Average width,	18 inches.
Tons,	8,741.2.
Assay per ton,	$23.29.
Gross value of block,	$203,582. 1635
Less 15 %,	$30,534.
Mining and milling, $4 per ton,	$34,964.
Net value of Block 1,	$138,084.

Detail of Block 2. Map No. 2.

In the first level south the samples taken were four and five into one, on account of the extreme difficulty of sampling. This level being bulk-headed and used as a reservoir for the pumping of the water from below with the small pump. The Cameron pump, used to supply the mill, etc., is at the station on first level. But after pumping out

1636 the reservoir it still leaves long pools of water of considerable depth, making sampling all but impossible.

The measurements and samples were taken with great care. The vein is very strong and well defined.

The old workings on the south end of Block 2 have been gutted of all the rich ore, leaving in sight only hard and barren quartz, save in one place, where a small streak of the former "bonanza" was left which essayed $245, but which was not figured in average of block.

1637 It is very likely Block 2 is as rich as Block 1, though only credited with 17.02 average.

SUMMARY BLOCK 2.

Dimensions,	256x130 and 156x100.
Average width,	14.5.
Tonnage,	5,012.
Average assay value,	$17.02.
Gross value,	$85,304.
15 %,	12,795.63.
Mining and milling,	20,048.
Net value,	$52,460.61.

1638 DETAILS BLOCK 3.

It will be noticed in this block that there is but slight change in width, the average being 19 inches and a slight decrease in assay value.

The two upraises show fine ore and a strong vein, the uprise to connect with first level south, is now started at a point 200 feet south of Shaft 2. Second level is a 9-foot winze, showing very rich ore. This point in estimation of owners being the apex of a bonanza shoot of ore, similar to that from which was extracted $160,000 (see stopes near Shaft 1). From this winze special hand samples run from $100 to $500, and much of the ore showing large wires of free gold.

The indications are certainly strong that this is 1639
the vicinity of bonanza. The assays made here have not been put into the general average, and form no part of the estimated money in sight.

The prospective value of the ground immediately under this block is greater than under any other portion.

SUMMARY BLOCK 3.

Average width,	19 in.
Dimensions,	88x276 feet.
Tonnage,	3,228.2.
Average assay value,	$11.41. 1640
Gross value,	$36,833.
Mining and milling,	12,912.80.
15 %,	$5,524.95.
Net value,	$18,397.

DETAILS OF BLOCK 4.

There is no material difference in this block from No. 3, the face showing a larger vein, as is expected. As the vein in old workings north is reported, by men who formerly worked in it, to be four and five feet wide, but of lower grade, their statement as to richnes varying from $6 to $18 per 1641
ton in mill. A contract has just been let to extend this drift 100 feet at a point 120 feet from shaft 2. A connection has been made with first level on vein all the way.

Dimensions of Block,	120x88
Tons,	1,355.20
Average width,	18.5 in.
Assay per ton,	$18.51
Gross value of Block,	$25,084.75
Less 15%,	3,762.00
Mining and milling, $4 per ton,	5,420.80
Net in Block,	15,900.80

1642 DETAILS OF BLOCK 5.

This ground is opened on two sides and 64 feet on lower side, with the contract now let to drive to line of shaft.

SUMMARY BLOCK 5.

Average width,	16.25 in.
Tonnage,	2,036 tons.
Average assay value,	$15.94
Gross value,	$32,453.84
Mining and milling,	8144
Net profit,	$19,442.75

1643 DETAILS OF GROUND BELOW LOWER LEVEL.

As will be noticed on the map, 70 feet of the shaft from the bottom is unsampled.

It is used as a sump and could not be cleared without considerable cost, as a loaded car is wedged in the shaft at a depth of 20 feet. The owner of the mine will clear it out open for inspection upon a verification of this report, if parties desire to purchase, and his superintendent stakes his reputation for veracity, that the sump shows the same strength of vein and quality of ore as found on the lower level. Allowing this to be a fact, there would
1644 be nearly as much ore between lower level and bottom of shaft as between first and second levels.

UNEXPLORED GROUND.

As both the San Jacinto and Good Hope mines have produced beyond any question large sums of money, both before and after consolidation, and have never reached a greater depth on north end of ledges (San Jacinto) than 110 feet or 150 feet on south end (Good Hope), leaving a large block of ground between them, it was believed by the present owner that there was profitable ore, and all his effort at development have been in this part of the mine. Now, as connection has already been made

with the south end of old workings, and it is clearly 1645
proven to be one continuous vein, and as the surface cuts and shafts have shown its continuity to the old workings north, it is settled beyond a reasonable doubt, that the ground will be profitable to the depth of the present shaft for the full distance between the old and new workings. An additional reason for these conclusions is, that from a shaft on Good Hope vein 95 feet from south end line, I find good vein and pay ore, and at a shaft 40 feet deep 1,600 feet north of the north workings of the San Jacinto there is a strong three-foot vein and pay ore, while at numerous small openings between ore is found. Occasionally the ledge divides, but 1646
in the main, is between good walls as soon as depth below surface erosion is reached.

By far the most interesting part of the mine for immediate exploration is the very rich ore struck on the lower level south, and which has only been explored to the depth of nine feet.

There is every indication at this point of a rich ore shoot.

Mill Tests and Ore on Dump.

There have been extracted by present ownership 1,800 tons of ore, 600 tons have been worked with 1647
present mill, and about 200 with an old five-stamp mill, leaving ore on dump at present, 1,000 tons.

The mill test was made in the following manner: Five pounds of average ore was put through a 50 mesh screen, ground in grinding mortar with quicksilver and potassium cyanide one hour and the tailings concentrated.

Pulp assayed,	$18.40
Concentrates percentage,	2%
Tailings assayed,	$2.06
Free gold,	$10.81
Value of concentrates per ton,	$260.00
Percentage saved,	87%

1648 SPECIAL ASSAYS.

At a shaft 25 feet deep, 1,150 feet north of old workings, on San Jacinto, the vein was struck at a depth of 18 feet from surface, and assayed $6, but between that point and old workings the ledge is deeply covered with soil.

A shaft 50 feet north of the one above mentioned is down 40 feet. The ore from it has been milled, and the vein is very well defined and from 2 to 3 feet wide. A sample taken at points accessible gave $8, $12, $38.50, $3.20, $7.50 per ton. Hand samples panned very much better. Numerous pannings
1649 and hornings were made at all the openings showing vein, and where the quartz was free from pyrytes the results tallied with the assays.

Quartz on old dumps assayed from a trace to $50 per ton. The same holds good of south end of mine.

The conclusions reached are that at no place on the vein so far opened are there long stretches of barren ground. The extreme distances sampled being 3,300 feet apart.

The parallel vein struck 20 feet south of east vein at shaft 2 is 14 inches wide, assays $19.63 and is entirely unexplored.

1650 The amount of ground needing exploration on this vein would keep the present hoists busy for several years and with very favorable results.

PLANT NEEDED ON MINE.

As there are no problems of treatment requiring special plant, it is mostly a matter of expediency as to the size of mill and power of hoist used.

I would suggest a hoisting plant of sufficient power to sink easily 1,000 ft., with pumps to handle any excess of water encountered.

One twenty-stamp mill built to add ten more, and vanners to handle all concentrates without

overcrowding. With the ore now in sight this 1651
plant would be kept running on a dividend paying basis and open up large reserves besides, as five men now furnish all the ore for the mill and that mostly from dead work. The entire monthly bills of mine at present amount to only $1,500 to $1,800.

Topography, Supplies, Et Cetera.

The country from the railroad, four miles distant, is slightly rolling, the surface ground of the mine itself being capable of cultivation. Perris on the Calif. Southern (Santa Fe system) is the shipping point, four hours distant from Los Angeles. Freight from Perris to the mine costs 50 cts. per 1652
ton, and best quality Oregon pine delivered at the mine for $25 per m.

Gran, hay and such supplies are very cheap; Los Angeles prices.

The water shed is into Lake Elsinore, distant about eight miles.

Prospective Value.

The points in favor of this being a long-lived mine are: The great regularity of the vein in strike and dip; the persistency of the pay streak and the evenness with which the gold is disseminated 1653
through the quartz.

The fact of its being in a country that yet leads all the world in the production of gold, and the similarity of the quartz and surrounding formation to many of the most productive mines on the coast. There is nothing to indicate aught but a permanent vein, and it should be of great commercial value, until the hoisting and mining at depth have increased quadruple its present cost.

Remarks.

In all of the assays made a small amount of silver is found, amounting to 2% of assay value,

1654 But not being of commercial importance, it is not figured in the estimates.

As the dump is constantly being added to, and as hand samples of large dumps is seldom satisfactory no samples were taken.

GRAND SUMMARY.

	Aver. width.	Aver. Assay Val.	Tonnage.	Gross Value.	Net Value.
Block 1,	18 in.	$23 29	8,741.2	$203,582	$138,084
Block 2,	14.5	17 02	5,012.	85,304	52,460
Block 3,	19.	11 41	3,228.2	36,883	18,395 25
Block 4,	18.5	18 51	1,355.2	25,084	15,900 60
Block 5,	16.25	15 94	2,036	32,453	19,441 05

1655

General Average Width.	General Average Assay Val.	Total Tonnage.	Total Gross Val.	Total Net Val.
17.25	$17 23	20,372.6	$383,256	$244,280 90

Plaintiffs' Exhibit No. 34.

Bullion receipts given in Burnham Rept., which defendant does not have:

	May 17/91	714–2	178	2,361 34
	May 30th/91	706	186	2,532 70
	June 15/91	726	186	2,532 70
	June 30/91	888	82	1,459 54
	June 20/91	703–2	186	3,511 57
	Dec. 10/91	883–2	78	2,447 45
	Oct. 30/91	855	72	3,284 50
	Nov. 10–91	800	83	903 43
1656	Dec. 25/91	855	80	2,006 19
	1892.			
	Jan. 10/92	628–2	157	801 80
	1891.			
	Mch. 15/91	750	182	3,369 81
	Mch. 30/91	790	183	2,026 31
	Apl. 14/91	712	276	2,050 76
	Apl. 30/91	721–2	270	1,404 74
	May 1/91	714	178	2,361 34
				33,054 18

Plaintiff's Exhibit No. 35.

This is a summary of the receipts for bullion, as shown by defendants' mint returns, a fuller summary of which returns appears below in the case as Defendants' Exhibit G.

Plaintiff's Exhibit No. 36. 1657

(Agreement between Sigafus and Bird and Maxwell).

Whereas, we, the undersigned, have placed in the hands of Walter S. Maxwell, for sale, the Good Hope Consolidated Gold Mining Company's property, lying and being in the County of San Diego, State of California, and as the negotiations are now pending and being carried on for the sale of said property to William Weston and J. H. Earnest Waters, of Denver, Colorado, which said negotiations have been brought about by the ability and 1658 skill of said Walter S. Maxwell.

Now, therefore, in consideration of the work and labor performed and skill exercised in bringing about said negotiations, we do hereby agree that upon the completion of the sale of the *Good Hope Consolidated Gold Mining Company's* property, by or through the negotiations instituted and conducted by the said Walter S. Maxwell, pay to him out of the proceeds of said sale the sum of twenty-five thousand ($25,000) dollars.

The said sum of twenty-five thousand ($25,000) dollars is to be paid to said Walter S. Maxwell, as follows, to wit: In accordance with the payments 1659 made to Waters and Weston for their commission, as mentioned in a certain contract entered into this day and date.

In witness whereof, we have hereunto set our hands and affixed our seals this seventh day of November, A. D. 1892.

JAMES M. SIGAFUS, [SEAL].
J. EVERETT BIRD, [SEAL].
WALTER S. MAXWELL, [SEAL].

1660 **Defendants' Exhibit "A."**

September 13th, 1895.

Mine office of
THE GOOD HOPE CONSOLIDATED GOLD MINING CO.,
John M. S. Egan, General Manager.

GOOD HOPE, June 25th, 1894.

JAMES M. SIGAFUS, Esq.,
San Francisco.

Dear Sir:

I received your kind note of the 24th this evening, and Mr. Griffith's on Saturday, and believe
1661 that affairs can be satisfactorily settled in New York or Boston, as you will find our people gentlemen of high standing and integrity. I have two tanks or settlers already built according to your plan, but for the present shall use a couple of mining cars until I can afford to build new ones of the style you described. I had considerable difficulty in getting Graham and Hill in the idea of the cars, but when they talked about any independent settling tanks, it involved shoveling and moving the settled tailings, so I simply asked them, why not move the coarsest at once, for it has to be moved eventually, and lessen the amount to be run out by the plangs in the tanks

1662 I believe myself that the best end of the mine is below the present level, for the north end will show less disturbance, as it shows less on the second than on the first level. I am pushing this third level as hard as I can, and you can depend on it, will resume sinking as soon as possible, but it will be hard work with a single compartment shaft, but a larger engine will make a great difference in the time used in hoisting.

I am glad that you naturally take a great interest in the property you were with so long, and I shall be obliged to you if you will send me your New York address, as I may have to ask your advice on other points.

Please present my compliments to Mrs. Sigafus, and I trust you will enjoy the midwinter fair; when I was there it was the Mid-winter Fair. 1663

Sincerely yours,

JOHN M. S. EGAN.

Defendants' Exhibit "B."

September 13th, 1893.

THE DENVER COMMERCIAL CLUB,

DENVER, COLO., November 29th, '93. 1664

J. M. SIGAFUS, Esq.,
Perris, Cala.

Dear Sir:

I received your telegram, which was very satisfactory and in keeping with the mill tests. Mr. Griffith and I arrived here this morning. I have to run up home to Georgetown, for a day or two, to look over matters there, but we shall have went East on Saturday night. Weather here delightful. With regards.

Sincerely yours,

JOHN M. S. EGAN.

I shall get my assays this evening and mail you the result. 1665

Defendants' Exhibit "C."

GEORGETOWN, COLO., Nov. 30th, '93.

J. M. SIGAFUS, Esq.,
Good Hope Mine,

Dear Sir:

I must have made some serious mistake in sampling the tailings, as Mr. Graham's assay gave 2.80 au. and 1.70 ag., whilst the crude ore only ran 1.50 au. and 1.00 ag.

1666 Following are assays of my samples:

1st level N.		1st level S.		2d level N.		2d level S.	
au.	ag.	au.	ag.	au.	ag.	au	ag.
.40	1.70	1.40	3.60	.64	1.36	39.80 (at shaft).	14.80
.80	2.00	2.40	2.54	.36	2.84	5.68	3.12
.27	1.23	.86	2.00	1.80	1.20	.40	1.80
.32	2.68	.65	1.10	1.47	1.53	1.00	2.00
.28	1.92					.80	2.00
.36	2.04						
1.36	2.24						

8″ streak breast of drift. 1st level N., 44.24 au.,
1667 26.76 ag.

Crude ore, sample of 20 tons, 1.50 au., 1.00 ag.

Sulphides or concentrates taken from cleaning amalgam, 68.20 au., 37.80 ag.

Ten inches of snow here and still snowing. Start East Saturday night.

Very truly yours,

JOHN M. S. EGAN.

1668 **Defendants' Exhibit B.**

(Letter, Griffith to Gibson, of April 10, 1896.)

HOLLENBECK HOTEL.

LOS ANGELES, CAL., May 10th, 1893.

T. M. GIBSON, Esq.,
Chicago, Illinois.

My Dear Sir:

Herewith I hand you Report and Map of the "Good Hope Consolidated Gold Mining Company's" property.

An irresponsible party had a short call on this mine which expires on the 17th of this month.

After and from that date the option is hereby given 1669
to you, for thirty days beginning with May 17th, and terminating June 17th, 1893, for the sum of five hundred thousand dollars ($500,000), payable as follows:

Four hundred thousand dollars ($400,000) on taking possession, and one hundred thousand dollars ($100,000) six months thereafter, the latter amount being secured by a mortgage bearing *no* interest.

On hearing from you, I will have the option made direct to the party you may designate, by the owner, providing they are sending out a man immediately to examine, with the assurance that if 1670
the mine is found to be as represented in the accompanying report and map, they will buy the property at the stipulated price.

The intending purchasers then have thirty days to make examination of the property, in any way they wish, in order to completely satisfy themselves as to its value. The mine can be thoroughly sampled either by assays or by running the mill.

T. M. G. - —2.

In the Report, you will notice that the last mint return is on May 6th, 1892, but there has been produced since then over $60,000.00 for which mint returns can be seen at the mine. 1671

The report also shows that lower level is about 900 feet long, but this level is now nearer 1,200 feet. The report was made last summer, and an examination of the mine will now show it to be in better condition than is represented in the Report.

Respectfully yours,

W. H. GRIFFITH.

1672 **Defendants' Exhibits C and D.**

Two promissory notes, Griffith to Sigafus, copy of which follows:

$6,000.00. Riverside, California, December 28th, 1893.

On or before July 1st, 1894, after date, without grace, for value received, I promise to pay to James M. Sigafus, or order the sum of six thousand dollars, without interest.

W. H. GRIFFITH.

1673 Pay to C. W. Morse, or order,
Walter S. Maxwell,
Without recourse to me,
C. W. Morse
by
B. B. Jones, Atty. in
fact,
Without recourse to me.
JAMES M. SIGAFUS.

1674

Defendants' Exhibit E.

1675

(Letter, Griffith to Sigafus.)

On the train,

Sept. 29/93.

My Dear Mr. Sigafus:

Yesterday evening I received telegram from my sister that my father was dying, and for me to come home as soon as the train could get me there. As there was a washout on the Santa Fe, and no trains would run for several days, I started by way of Sacramento. The party bringing the money 1676
also wired me yesterday that he would leave the East immediately after the seventh of the month. If my father should linger long, I will endeavor to have the money sent to you. But if the end comes before I reach home, or soon thereafter, I will then come West with the party. I will give the matter my immediate attention, and get to you or send the money as soon as the circumstances will permit. Don't fail to send me that report and map to Mercer, if you have not sent it to Los Angeles. If you sent it there, it will be forwarded by the hotel to me. Am sorry I did not see you again before starting, but the impending loss of my father really un- 1677
fits me to talk business to any person.

Respectfully,

W. H. GRIFFITH.

Will wire you from Mercer.

Defendants' Exhibit F.

Blue pencil sketch of mine as it was in May, 1891.

1678

Defendants' Exhibit "G."

Receipts and returns for bullion shipped from the Good Hope Mine, March 4th, 1890, to December 27th, 1893, inclusive.

The following is a tabulated statement of the contents of these returns and receipts:

	Date of Rcpt.	Whose Rcpt.	Weight of Bullion. Before Melting.	After Melting.	Gold. Fine.	Value.	Silver. Fine.	Value.	Gross Value.	Net Value.
	1890.									
	Mch. 4.	Mint.	93.26	93.12	704	1,355.16	262	22.94	1,378.10	1,371.38
	Apl. 14.	Price.	125.80	120.75	280	574.10	000	14.05	588.15	586.43
	May 5.	Mint.	83.83	82.20	596	1,013 58	172	13.22	1,026.80	1,020.36
	Total.								$2,993.05	$2,978.17
	1891.									
1679	Apl. 6.	Mint.	122.32	122.15	710½	1,794.05	269½	32.04	1,826.09	1,817.58
	May 6	Selby.	99.07	99.07	706	1,445.84	244	23.46	1,469.30	1,463.22
	June 5.	Mint.	123.26	116.50	727	1,750.81	256	28.00	1,778.81	1,770.65
	June 10.	Selby.	160.23	155.11	721	2,311.81	263	38.47	2,350 28	2,340.74
	Aug. 24.	Mint.	120.86	116.51	713	1,717.33	272	29.82	1,747.05	1,738 89
	Oct. 14.	Mint.	118.	112.32	709	1,646.20	272	28.75	1,674.95	1,667.05
	Nov. 27.	Mint.	117.26	113.30	712½	1,668.74	268½	28.62	1,697.36	1,689.40
	Dec. 10.								296.52	296.52
	Total.								$12,840.36	$12,784.05
	1892.									
	Jan. 2.	Mint.	114.66	114.48	705	1,668.39	264	28.43	1,696.82	1,688.79
	Feb. 6.	Selby.	118.40	117.84	692	1,685.68	261	27.53	1,713.21	1,708.33
	Mch. 5.	Mint.	248.79	196.89	711	2,893.82	268	47.35	2,941.17	2,928.08
	Mch. 24.	Mint.	138.97	120.05	715	1,774.38	271	29.20	1,803.58	1,795.21
	Apl. 16.	Mint.	116.13	115.88	712	1,705.54	260	26.29	1,731.83	1,723.71
	May 4.	Mint.	157.69	133.85	714½	1,976.97	272½	30.77	2,007.74	1,998.52
	June 3.	Fargo.		Express receipt.					2,000.00	2,000.00
	July 2.	Selby.		Sulphurets.					269.22	259.95
	July 11.	Mint.	154.14	151.26	709	2,216.91	277	35.37	2,252.28	2,241.98
1680	Aug. 4.	Mint.	158.92	152.76	719	2,270.47	269	34.65	2,305.12	2,294.73
	Oct. 13.	Selby.	82.25	79.33	707	1,159.39	277	18.41	1,177.80	1,172.92
	Nov. 4.	Selby.	119.70	114.25	711	1,679.19	275	26.31	1,705.40	1,698.47
	Nov. 28.	Selby.	81.92	77.68	711	1,141.70	271	17.62	1,159.32	1,154.55
	Dec. 15.			Concentrates.					1,144.85	983.40
	Dec. 21.	Price.	137.30	131.01	707½	1,914.45	271	1.60	1,916.05	1,913.66
	Total,								$25,834.39	$25,663.38
	1893.									
	Jan. 26.	Mint.	142.08	130.07	708	1,904.99	273	30.02	1,935.01	1,926.02
	Feb. 28.	Mint.	161.36	140.74	706	2,055.44	269	32.	2,287.44	2,077 80
	Apl. 22.	Mint.	193.24	159.82	692	2,287.85	268	36.22	2,323.07	2,316.46
	June 16.	Selby.	35.88	33.10	277	189.51	25	.61	190.12	186.60
	Aug. 4.	Mint.	195.34	187.82	701	2,721.67	271	35.80	2,757.47	2,744.93
	Sep. 28.	Mint.	353.90	328.86	710	4,830.07	274	63.49	4,893.56	4,872.56
	Nov. 1.	Mint.	97.61	92.27	706	1,345.66	276	16.57	1,362.23	1,355.56
	Dec. 1.	Mint.	129.14	119.24	709	1,747.61	274	21.22	1,768.82	1,760.51
	Dec. 27.	Selby.	186.30	175.86	711	2,584.71	268	30.27	2,614.98	2.604.17
	Total.								$19,932.70	$19,844.41
	Grand total.								$61,590.50	$61,270.01

Defendants' Exhibit H.

Location of samples for assay affecting value of the mine and assays.

A level eighty feet down No. 1 of main shaft.

No. 1. From right side of uprise 1,18.2 up from level, upper side, north of shaft, vein 19 inches wide.

No. 2. From bottom of level, opposite first uprise, from two places, average of vein 6 inches.

No. 3. From bottom of level six feet south of second uprise, vein 16 inches wide.

No. 4. Bottom of level ten feet north of uprise No. 2 ledge 6 feet wide (from both sides).

No. 5. Average sample from uprise No. 5, two veins foot and hanging, 12 inches and 8 inches.

No. 6. From fourth uprise, forty feet up top of stope, vein 30 inches.

B level, one hundred sixty-five feet from surface of No. 1 or main shaft.

No. 7. From the bottom, forty-eight and one-half feet north of shaft, vein 18 inches wide.

No. 8. From the bottom, 89.3 feet north of shaft, vein 18 inches wide.

No. 9. At top of chute 3, B level, 42 feet up, vein 12 inches.

No. 10. From stope of south winze 22 feet from floor of level, 25 feet from south end of stope, vein averages 17 inches.

Old first level, 243 feet from surface of working shaft.

No. 11. From bottom of level 219 feet north of shaft, width of vein 27 inches.

No. 12. From 258 feet north of shaft, bottom of level, hanging wall vein, width 18 inches.

No 13. From hanging wall vein, opposite chute No. 9, 390 feet north of shaft, width 18 inches.

No. 14. Sample of dry concentrates from bin.

1684 No. 15. From hanging wall vein out of underhand stope, first level 440½ feet north of shaft, vein 8 inches wide.

No. 16. From hanging wall vein, 480½ feet north of shaft, vein 12 inches wide.

No. 17. From 496 feet north of shaft, hanging wall, vein 14 inches wide.

No. 18. From 529½ feet north of shaft, hanging wall, vein 20 inches wide.

No. 19. From 548 feet north of shaft, hanging wall, vein 12 inch wide, show sulphurates.

No. 20. From 602½ feet north of shaft, hanging
1685 wall, vein 24 inches wide.

No. 21. From 639 feet north of shaft, hanging wall, vein 12 inches wide.

No. 22. From 757.55 feet north of shaft, north of last stope from No. 2 level, vein 12 inches wide.

No. 23. From 709 feet north of shaft, hanging wall, vein 12 inches wide.

No. 24. From 763 feet north of shaft, vein 18 inches wide.

No. 25. 780 feet north of shaft, average of two veins, hanging wall, 10 inches wide, foot wall, vein 5 inches wide.

1686 No. 26. From 795 feet north of shaft, vein 7 inches wide in floor of level.

No. 27. From 804 feet north of shaft, hanging wall, vein from back of level, 18 inches wide.

No. 28. From 954.35 feet north of shaft, extreme end or face of level, two veins width of ledge 6 feet.

First level, first stope north of shaft.

Average of hanging and foot wall veins; hanging wall, vein 20 inches wide; foot wall, vein 6 inches wide, where it pinches; 67 feet up chute No. 1.

No. 29. Is average from both veins as above.

No. 30. From third stope north of shaft, on the

first level, third chute, 18.3 feet up, 421 feet south to end of stope, vein 30 inches. 1687

No. 31. From foot wall in above stope, south of No. 4 chute, 44 feet up, vein 14 inches wide.

No. 32. From foot wall of uprise, over chute No. 5, vein average 9 inches.

No. 33. Average sample from foot wall, same places as No. 32, hanging wall, vein 10 inches wide.

No. 34. 70 feet above level and 30 feet north of chute No. 5, vein 2 inches.

No. 35. From stope opposite chute No. 6,72 feet up, average of vein which is 10 inches wide.

No. 36. From winze, bottom of old south shaft, being worked by Walter Smith, Frank Bates and George Langford, bottom of winze, vein 18 inches wide. 1688

No. 37. From same vein, five feet above last sample, vein 1 foot wide.

No. 38. Foot wall, vein of Smith, Bates & Langford's claim, vein 10 inches wide.

No. 36 X. First level, 19 feet north of chute No. 6, vein 6 inches wide.

No. 51 X. From Keough & Jones's stope, 8 feet below the level, vein two feet wide.

No. 38 X. 12 feet up stope at chute No. 13, 20 inches wide. 1689

No. 39. 96 feet up from No. 1 level, vein on foot wall, vein 18 inches wide, 6 inches waste, average of whole vein.

No. 40 X. 39 feet from south of line from chute No. 13, 96 feet up from level No. 1, vein 18 inches.

No. 41. In stope near chute No. 15, vein 8 inches wide.

No. 42. 30 feet up from first level, vein 20 inches wide; 2 feet between walls. Above stope is 10 feet north of chute No. 16.

No. 43. From stope over No. 17 chute, vein 18 inches all around, except on north corner, where

1690 it divides and shows hanging wall 8 inches wide, and foot wall vein 5 inches wide.

No. 44. Average sample from above stope, chute No. 18, first level, vein 5 inches.

No. 45. From 23 feet south of chute No. 18, vein 12 inches.

No. 46. Old north or gasoline shalft. Sample taken from stope at head of chute No. 7, and 20 feet south of old shaft; vein 4 inches wide.

No. 47. From head of No. 8 chute on foot wall; vein 8 inches wide, 34 feet from south side of shaft.

No. 48. From opposite chute No. 9, vein averages
1691 6 inches on foot wall.

No. 49. From opposite manhole No. 3 foot wall, vein 8 inches wide.

No. 50. From 9 feet north of manway No. 3, vein averages 14 inches.

No. 51. From north side of old shaft, about 50 feet from bottom, vein 14 inches wide.

No. 52. First sample on second level, hanging wall 35 feet from main shaft, vein 13 inches wide.

No. 53. From opposite chute No. 3, 105 feet north of main shaft, sulphurets, vein on hanging wall 8½ inches wide.

No. 54. From hanging wall, 70 feet up chute No.
1692 9, and 15 north, end of stope, vein 3 feet wide.

No. 55. From hanging wall, 70 feet up and 10 feet south of same manway; vein 19½ inches wide.

No. 56. 46 feet from north end of stope, from foot wall; vein 8 inches wide.

No. 57. 10 feet north of No. 10 chute, 8 feet east of upper end of shaft No. 10, vein 1 foot wide.

No. 58. Surface samples, first prospect. Hole 35 feet south of road, 85 yards south of centre point of north end of claim; vein 1 foot under surface, 2½ feet wide.

No. 59. From pit about 15 feet south of tree, 10 feet north of path, 4 feet down from surface; vein

2½ feet wide on north side of hole (on south side the 1693
vein is 4 feet wide with 14 inches ore).

No. 60. From cut, 27 feet south of No. 59 pit; vein 20 inches wide.

No. 61. From *Prospect Hole*, southwest of vertical shaft which is about 800 feet west of prospect holes on main ledge; sample from iron vein, 2 feet and 8 inches wide, but not really a vein in our opinion.

No. 62. From ledge cropping out on surface, 20 feet south of Prospect Hole from which No. 61 was taken.

No. 63. Sample from hanging wall vein, cropping 1694
out ground vein 10 inches wide, 28.75 feet south of old mill.

No. 64. Shaft (filled up) to within 9 feet of surface, S.E. of old mill, average sample from hanging wall and foot wall; hanging wall vein 3 feet, foot wall vein 10 inches.

No. 65. Upper side of hanging wall, about 100 feet from surface, 8 feet north of old shaft; vein 2½ feet wide.

No. 66. From bottom end of drift, 4 feet from shaft, 6 feet further down than No. 65; vein 18 inches wide.

No. 67. North of shaft, 80 feet from surface; 1695
vein 8 inches wide.

No. 68. Northwest of old hoisting works on old shaft; vein 7 inches wide.

No. 69. In long cross-cut, near southermost shaft; vein 5½ feet wide.

No. 70. Sample from north side of cross cut B; vein 6 inches wide.

No. 71. From south side of cross-cut B; vein 7 inches wide.

No. 72. From small stope at foot of shaft, south side at 100-foot level; vein 18 inches.

No. 73. From northwest corner of shaft at 100-

1696 foot level; ore averages 18 inches wide at bottom of shaft. Two feet south of end of drift shows width 26 inches.

No. 74. 100 feet down old south shaft and 16 feet north; vein 2 feet wide.

No. 75. 14 feet up shaft from 100-foot level; vein 6 inches wide.

No. 76. 6-foot drift; 31.60 from bottom of shaft at 100-foot level; vein 10 inches wide.

No. 77. Top of north drift, about 50 feet up shaft; vein 2 inches.

No. 78. Average sample from north side of
1697 Smith, Bates & Langford's stope, 12 inches wide, 18 feet up from floor; vein at bottom 10 inches wide.

No. 79. South of stope, next to hanging wall; about 12 feet south of north corner from foot wall; ledge 34 inches wide; vein 10 inches wide.

No. 80. From hanging wall; south end of stope; 30 inches between two veins; hanging wall vein 10 inches; foot wall vein 8 inches.

No. 81-X. Resampled from No. 81.

No. 81. Top of stope, foot wall vein, 2 feet between walls; vein 22 inches.

No. 82. From the stope 23 feet up shaft from last
1698 level, and 6 feet south; vein 2 feet wide.

No. 83. 45.5 feet up from level; vein one foot wide.

No. 84. From hanging wall at west end of crosscut, just inside level; vein 4 inches wide.

No. 85. From foot wall on east side of drift; vein on foot wall 7 inches—2 feet of waste, then 3 inches of ore.

No. 86. 66.75 feet from south of drift on east side of foot wall; vein 14 inches wide, foot wall vein.

No. 87. From opposite south side of first uprise vein 6 inches; hanging wall vein.

No. 88. From end of drift; vein 6 inches.

No. 89. Twenty-four feet up from 110-foot level; in Old South Shaft; foot wall vein 6 inches. 1699

No. 90. Eight feet up the first and only uprise in same level, viz., 78 feet N Level of Old South Shaft. Sample clear across vein; vein 3 feet and 2 inches.

No. 91. From bottom of cross-cut 14 feet up vein on foot wall; 2½ inches, ledge 9 feet to hanging wall.

No. 92. North side of uprise, 31.25 feet from level vein 3 feet and 2 inches.

No. 93. On top of uprise; hanging wall vein 26 inches. 1700

No. 94. Forty feet south of main shaft, B. Level vein on hanging wall 6 inches.

No. 95. From bottom of level. From hanging wall. Taken 53 feet south from south side of working shaft; vein 15 inches wide.

No. 96. In line with No. 95, from foot wall; vein 12 inches wide.

No. 97. Taken from bottom of level where the stope has been broken through from below; foot to hanging; vein 3½ feet wide. Taken 107½ feet south from main shaft.

No. 98. About 5 feet down stope; vein is 4 inches wide between walls; vein 16½ inches. 1701

No. 99. From north side of stope opposite chute No. 5, down 5 feet on stope; vein 18 inches wide.

No. 100. South end of same stope hole as No. 99; vein 9 inches wide. Ore shows on ledge 6 feet both sides in both the last stope holes of same width or as wide as where samples were taken from. There can be seen about 10 feet of ore down in stope holes from level.

No. 101. 233½ feet south from main shaft; hanging wall vein 5 inches.

No. 102. 231 feet south from main shaft; from under rail; foot wall vein 12 inches.

1702 No. 103. From opposite cross-cut, from foot wall; vein 6 inches wide.

No. 104. From opposite cross-cut, from hanging wall vein 8 inches wide; 6 feet between walls.

No. 105. End of level; foot wall vein. Average of vein 10 inches.

No. 106. Hanging wall vein, end of level; average of vein 5 inches.

No. 107. From hanging wall, 13 feet south of main shaft; vein 8 inches. On level No. 2.

No. 108. 36 feet south from shaft, hanging wall west side of shaft; vein 12 inches wide. Hanging
1703 wall goes down to lower level.

No. 109. 80 feet south of main shaft and 10 feet down at bottom of pillar; foot wall 8 feet wide.

No. 110. From hanging wall same place; vein 8 feet wide.

No. 111. From south side of same pillar; vein 30 inches.

No. 112. From back of No. 2 level, just north of cave. Second level north side, starts at chute No. 4 to measure from south side of chute No. 4.

No. 113. From second level, west side of hanging wall; 286 feet north from shaft; vein 14 inches.

No. 114. From 308½ feet north from main shaft;
1704 hanging wall vein 12 inches.

No. 115. 351½ feet north of main shaft; hanging wall vein 10 inches.

No. 116. 376 feet north of main shaft; hanging wall vein 28 inches.

No. 117. 403½ feet north of main shaft; hanging wall vein 2 inches.

No. 118. Opposite chute No. 11, 432.8 north from main shaft; hanging wall vein 15 inches.

No. 119. 453 inches north of main shaft; hanging wall vein runs down and disappears here; vein 8 inches wide.

No. 120. From foot wall, 487 feet north of main

shaft, back of level. Hanging wall vein begins to 1705
show on west side; vein 3 inches wide.

No. 121. Hanging wall vein, 502 feet north from main shaft; vein 4 inches wide.

No. 122. 96 feet north of chute No. 11, 529 feet north of shaft. Underhand stoped for 35 feet; vein 5 inches.

No. 123. Scraped off lagging stull between chute Nos. 12 and 13, opposite underhand stope, said to contain very rich ore.

No. 124. Sample of ore found in refuse from rich underhand stope before mentioned.

No. 125. Same as No. 124.

1706

No. 126. Sample taken from waste dumped in underhand stope, as before mentioned; average taken for about 15 feet, along to beyond opposite chute No. 12.

No. 127. From foot wall, where it goes east 25 degrees under horse taken 12 feet south of chute 12, vein 5 inches. For 33 feet north of chute 14 vein averages 5 inches.

No. 128. 633.5 feet north of main shaft and 46 feet north of chute 14, hanging wall top vein, 4½ inches, middle vein 4 inches, bottom vein 15 inches. Same is average of the three veins.

No. 129. 668.75 feet north of main shaft from 6 1707
feet north of chute 16 on east side, from slope of foot wall, vein 15 inches.

No. 130. From bottom of winze, 30½ feet from bottom of lower level; hanging wall vein 4 inches.

No. 131. From south end of level out of winze, hanging wall ore vein 20 inches.

No. 132. From 15 feet above A level, 15 feet south of shaft, head of drift, Miner Glover, vein 13 inches.

No. 133. Above 40 feet above A level in stope, about 55 feet north of No. 1 manway and chute, north side, Miner Mitchell, vein 14 inches wide.

1708 No. 134. Lower level, 100 feet north of shaft, winze south side, 10 feet below level No. 3, Miner Jeffries, vein 17 inches.

No. 135. Taken 213 feet north of main shaft and 66 feet up from level No. 3.

No. 136. Same level, north about 215 feet from main shaft, 287 feet above level No. 3 in stope, Miner Y. George, vein 16 inches.

No. 137. From point 210 feet north of main shaft 91½ feet up from No. 3 level, vein 16 inches wide.

No. 138. In upper A level 6 feet north of main shaft, vein 10½ inches.

1709 No. 139. From upper A level 41½ feet south of shaft, vein 33 inches.

No. 140. Top of uprise No. 1 of A level, vein 8 inches.

No. 141. From south side of uprise No. 2 north of the shaft, 42½ feet above the floor, width of vein 3 feet.

No. 142. Top of stope on the north side of chute 2, of A level, 49 feet up, vein 18 inches.

No. 143. North end of stope in A level, 6 feet north of chute No. 2, vein 3 feet.

No. 144. From lower level south end of winze, vein 15 inches.

1710 No. 145. 89 feet up chute 5 of No. 3 level, and 15 feet north of the chute, vein 2½ feet.

No. 146. From top of stope 67 feet up, vein 2 feet.

No. 147. Is 76 feet up from the floor of level No. 3, north of main shaft, and 64 feet south of chute No. 5, vein 2 feet wide.

No. 148. Sulphurets from Vanner.

No. 149. Sulphurets from Vanner of Company, ore run by Smith and Goldsworthy.

No. 150. Sample of refuse iron, etc., from clean up from cylinder from mill.

No. 151. To south side No. 1 chute, manway on

S. side of chute, 15 feet north of shaft, 28 feet north of main shaft, vein 15 inches. 1711

No. 152. Level No. 3, 91¼ feet north of main shaft from the bottom level, opposite No. 2 chute, vein 15 inches.

No. 153. 127 feet north of shaft, took sample from bottom of level opposite chute No. 3, vein 2 feet 5 inches.

No. 154. 164.35 to chute No. 4, manway N. vein 12 inches.

No. 155. 297.35 to chute No. 5, through manway on south hanging wall, vein 9 inches.

No. 156. From point 39.6 feet up chute 2 of level No. 3, 9 feet south of centre of chute, vein 9 inches. 1712

No. 157. 57 feet up chute No. 1 of level No. 3, 4 feet south of south side of chute, vein 12 inches.

No. 158. Point from back of stope 62 feet up chute 1 of level No. 3, and 2 feet N. of north side of chute, vein 12 inches.

No. 159. Point 57 feet up chute No. 2 of level 3, and 10 feet north of north side of chute.

No. 160. 63 feet up chute 2 of level 3, and 6 feet north of chute, vein 24 inches.

No. 161. Point 61½ feet up chute No. 2 of level No. 3, and 19 feet north of north side of chute, vein 5 inches. 1713

No. 162. Sample of adobe clay on surface 57 feet W. of Old South Shaft, from an area of 100 feet square and 2½ to 3 feet thick.

No. 163. Up chute No. 4 a distance of 36¼ feet from bottom of No. 3, vein 12 inches.

No. 164. 92 feet up chute 4 of No. 3 level, and 48 feet north of chute 4, vein 24 inches.

No. 165. From same stope 90½ feet up, vein 12 inches and 13 feet south of chute.

No. 166. 77 feet up and 13 feet south of chute 4 in No. 3 level, vein 12 inches.

No. 167. From a point 60¼ feet up manway north

of chute 4 of No. 3 level north, and 56 feet north of the north side of the manway, vein 14 inches.

No. 168. Point 36½ feet up manway north of chute 4, 40 feet north of the same; vein 14 inches.

No. 169. From point 4½ feet up north side of manway on the north side of chute 4 of level No. 3; vein 12 inches.

No. 170. 14 feet south of chute No. 6, 15 feet up from bottom of No. 3 level; vein 18 inches.

No. 171. From waste from bottom of stope north of chute No. 6; 5 to 7 tons of this waste lying on bottom of stope.

No. 172. From point 19 feet up from level No. 3, and 8 feet north of chute No. 6; vein 18 inches wide.

No. 173. 15 feet west of chute No. 6, and 12 feet up from level No. 3; vein 14 inches.

No. 174. From point 2 feet up on south side of uprise No. 6; vein 12 inches wide.

No. 175. From foot wall uprise; 17.3 up chute, 6 feet from No. 3 level; vein 12 inches.

No. 176. Sample from under railroad track, 31½ feet south from and across main shaft in floor; vein 2½ feet.

No. 177. Opposite north side of chute No. 2 on floor; vein 16 inches wide.

No. 178. From opposite chute No. 3, south side of shaft 121 feet from shaft on floor, lower level No. 3, hanging wall; vein 18 inches.

No. 179. From 6 feet north of chute No. 4; vein 18 inches hanging wall.

Nos, 180 to 189. (No samples taken. Mistake in numbering.)

No. 190. 16 feet north from face of south end of drift; vein 7 inches.

No. 191 40 feet north of face; vein 14 inches in the back; pitch 60 degrees.

No. 192. 83 feet north of face; vein 25½ inches

wide. Face of drift second level south has nine drill holes in it. 1717

No. 193. 12 feet south of old South Shaft; vein 15 inches; pitch 50 degrees.

No. 194. From bottom of level, 4 feet south of chute No. 1, south corner of stope hole; vein 2 feet and 9 inches.

No. 195. From point 216 feet north of face of drift 8 feet up; vein 18 inches.

No. 196. From south side of Crawford's stope, within 12½ feet of shaft, four feet below floor of level No. 1; vein 4¼ feet all through; sample is average. 1718

No. 197. From foot wall, at 15 feet down from level No. 1, and 29 feet north of Crawford's manway, between chutes 3 and 4, level No. 2; vein averages 20 inches wide.

No. 198. Sample from hanging wall, same stope, taken 29 feet down from level; 5 feet waste between two veins, vein 7 inches.

No. 199. 5 feet north of chute No. 5, 14 feet above, vein 7½ inches.

No. 200. From 12 feet up and 5 feet south of No. 5 chute, vein 14 inches.

No. 201. From under timber 24 feet south of main shaft, vein cropping out on surface 6 inches wide. 1719

No. 202. Top of uprise No. 7, 52 feet up, vein 2 feet.

No 203. 34 feet up chute No. 7, south side, vein 3 feet.

No. 204. 57 feet up and 15 feet south of chute No. 6, No. 2 level, average waste from bottom of stope or uprise, vein 14 inches.

No. 205. 70 feet up and 15 feet north of chute No. 6, No. 2 level, vein 14½ inches.

No. 206. From talc and clay from seam south corner of uprise, No. 7 of No. 2 level.

1720 No. 207. From hanging wall vein 14 inches, 42 feet up and 20 feet south of chute No. 9, No. 2 level.

No. 208. 2 feet above sample No. 207, vein 19 inches.

No. 209. 25 south of chute No. 12, in front of level, took sample of surface not over one-eighth inches deep; claim Sigafus salted mine here.

No. 210. Sample of ore from directly under the above.

No. 211. 14 feet below No. 2 level and 550 feet north of main shaft, vein 26 inches quartz.

1721 No. 212. Sample from south lower end of stope, 22 feet south of sample 211 and 9 feet below No. 2 level in south end of stope, vein 18 inches.

In the drift, at bottom of stope, the ore is three feet wide on an average.

No. 213. Sample from face of K and J drift; vein 38 inches; 24 feet south of chute No. 13, No. 3 level, and 34 feet below level No. 2.

No. 214. Taken from drift in Gasoline shaft, from corner.

No. 215. From face of A level south; vein 5 inches at hanging wall.

No. 216. Hanging wall vein in face of A level,
1722 south vein; vein averages 15 inches ore and waste. The sample is average of both.

No. 217. From side of uprise in A level south of shaft; average of both sides; vein averages, taken 75 feet up from level, 16 inches. Three feet between walls filled with vein of ore and waste. Vein of solid ore 16 inches.

No. 218. From top of uprise in A level south, 29 feet up, taken from both sides; on north side, vein is 3 feet; on south side, average is 2 feet and 4 inches.

No. 219. From bottom of Gasoline shaft at north corner of level; vein 10 inches.

ASSAY VALUE OF SAMPLES TAKEN FROM ORE VEINS IN GOOD HOPE MINE, AT PERRIS, RIVERSIDE COUNTY, CALIFORNIA, AND AVERAGE OF SUCH ASSAYS AFFECTING VALUE OF SUCH MINE. 1723

Assay No. 1,	$12 71
Assay No. 2,	2 22
Assay No. 3,	1 23
Assay No. 4,	110 47
Assay No. 5,	2 39
Assay No. 6,	1 44
Assay No. 7,	23 07
Assay No. 8,	62
Assay No. 9,	5 38
Assay No. 10,	1 21
Assay No. 11,	1 19
Assay No. 12,	1 72
Assay No. 13,	13 66
Assay No. 15,	23 24
Assay No. 16,	5 32
Assay No. 17,	1 12
Assay No. 18,	19 06
Assay No. 19,	26 46
Assay No. 20,	1 14
Assay No. 21,	1 67
Assay No. 22,	1 10
Assay No. 23,	5 42
Assay No. 24,	0 00
Assay No. 25,	1 10
Assay No. 26,	1 09
Assay No. 27,	0 00
Assay No. 28,	0 00
Assay No. 29,	15 81
Assay No. 30,	5 29
Assay No. 31,	58
Assay No. 32,	20 98
Assay No. 33,	15 76
Assay No. 34,	31 36
Assay No. 35,	31 34
Assay No. 36,	0 00
Assay No. 36 X,	2 13

1724

1725

1726	Assay No. 37,	$26 05
	Assay No. 37 X,	1 10
	Assay No. 38,	22 89
	Assay No. 38 X,	00 00
	Assay No. 39,	1 10
	Assay No. 40 X,	57
	Assay No. 41,	2 19
	Assay No. 42,	6 33
	Assay No. 43,	1 10
	Assay No. 44,	6 42
	Assay No. 45,	95 05
	Assay No. 46,	0 00
	Assay No. 47,	31 31
1727	Assay No. 48,	28 93
	Assay No. 49,	18 76
	Assay No. 50,	1 10
	Assay No. 51,	5 29
	Assay No. 51X,	5 29
	Assay No. 52,	1 10
	Assay No. 53,	35 48
	Assay No. 54,	2 22
	Assay No. 55,	20 90
	Assay No. 56,	5 32
	Assay No. 57,	17 80
	Assay No. 58,	0 00
	Assay No. 59,	63 14
1728	Assay No. 60,	0 00
	Assay No. 63,	1 10
	Assay No. 64,	2 13
	Assay No. 65,	20 76
	Assay No. 66,	23 28
	Assay No. 67,	31 40
	Assay No. 68,	0 00
	Assay No. 69,	0 57
	Assay No. 70,	3 50
	Assay No. 71,	26 14
	Assay No. 72,	20 97
	Assay No. 73,	20 98
	Assay No. 74,	22 01
	Assay No. 75,	4 28
	Assay No. 76,	5 29

Assay No. 77,	$87 94	1729
Assay No. 78,	5 32	
Assay No. 79,	5 32	
Assay No. 80,	3 22	
Assay No. 81,	5 32	
Assay No. 81X,	4 26	
Assay No. 82,	3 26	
Assay No. 83,	15 83	
Assay No. 84,	2 19	
Assay No. 85,	31 33	
Assay No. 86,	2 19	
Assay No. 87,	1 10	
Assay No. 88,	2 17	
Assay No. 89,	0 57	1730
Assay No. 90,	3 26	
Assay No. 91,	0 00	
Assay No. 92,	3 26	
Assay No. 93,	0 00	
Assay No. 94,	3 26	
Assay No. 95,	37 54	
Assay No. 96,	33 40	
Assay No. 97,	9 57	
Assay No. 98,	8 57	
Assay No. 99,	15 79	
Assay No. 100,	3 25	
Assay No. 101,	5 31	
Assay No. 102,	38 44	1731
Assay No. 103,	2 19	
Assay No. 104,	20 97	
Assay No. 105,	1 10	
Assay No. 106,	0 57	
Assay No. 107,	18 84	
Assay No. 108,	41 70	
Assay No. 109,	1 10	
Assay No. 110,	2 19	
Assay No. 111,	1 10	
Assay No. 112,	0 54	
Assay No. 113,	1 09	
Assay No. 114,	0 57	
Assay No. 115,	2 19	
Assay No. 116,	1 10	

1732	Assay No. 117,	$2 22
	Assay No. 118,	1 10
	Assay No. 119,	0 57
	Assay No. 120,	1 19
	Assay No. 121,	0 57
	Assay No. 122,	0 58
	Assay No. 124,	1,153 33
	Assay No. 125,	270 05
	Assay No. 126,	7 99
	Assay No. 127,	1 10
	Assay No. 128,	20 97
	Assay No. 129,	0 00
	Assay No. 130,	0 00
1733	Assay No. 131,	0 00
	Assay No. 132,	270 05
	Assay No. 133,	20 97
	Assay No. 134,	20 91
	Assay No. 136,	20 91
	Assay No. 137X,	757 13
	Assay No. 138,	3 22
	Assay No. 139,	10 49
	Assay No. 140,	1 65
	Assay No. 141,	0 00
	Assay No. 142,	32 30
	Assay No. 143,	1 10
	Assay No. 144,	1 67
1734	Assay No. 145,	0 00
	Assay No. 146,	0 57
	Assay No. 147,	0 57
	Assay No. 151,	12 93
	Assay No. 152,	0 63
	Assay No. 153,	0 61
	Assay No. 154,	1 26
	Assay No. 155,	2 66
	Assay No. 156,	5 58
	Assay No. 157,	2 91
	Assay No. 158,	16 00
	Assay No. 159,	5 33
	Assay No. 160,	5 49
	Assay No. 161,	1 19
	Assay No. 162,	9 54

Assay No. 163,	$16 17	1735
Assay No. 164,	2 22	
Assay No. 165,	10 73	
Assay No. 166,	15 84	
Assay No. 167,	0 00	
Assay No. 168,	1 19	
Assay No. 169,	0 00	
Assay No. 170,	0 00	
Assay No. 171,	0 58	
Assay No. 172,	1 19	
Assay No. 173,	0 59	
Assay No. 174,	1 19	
Assay No. 175,	1 19	
Assay No. 176,	1 27	
Assay No. 177,	0 58	1736
Assay No. 178,	2 22	
Assay No. 179,	0 67	
Assay No. 180,	67 85	
Assay No. 190,	4 52	
Assay No. 191,	1 27	
Assay No. 192,	18 75	
Assay No. 193,	2 30	
Assay No. 194,	3 49	
Assay No. 195,	157 03	
Assay No. 196,	21 34	
Assay No. 197,	131 20	
Assay No. 198,	57 69	
Assay No. 199,	13 51	1737
Assay No. 200,	42 01	
Assay No. 201,	8 15	
Assay No. 202,	1 10	
Assay No. 203,	1 19	
Assay No. 204,	0 00	
Assay No. 205,	0 58	
Assay No. 205X,	2 27	
Assay No. 206,	1 16	
Assay No. 207,	1 19	
Assay No. 208,	1 22	
Assay No. 209,	15 90	
Assay No. 210,	7 04	
Assay No. 211,	1 10	

1738

Assay No. 212,	0	58
Assay No. 213,	$2	98
Assay No. 214,	5	51
Assay No. 215,	5	57
Assay No. 216,	2	13
Assay No. 217,	29	09
Assay No. 218,	42	45
Assay No. 219,	8	15
Assay No. 220,	5	38
Total,	$4,705	72

Total number of assays, 209.

1739 Average value of assays, $22.51.

Defendants' Exhibit I.

This is map of the experts Smith and Goldsworthy, to be produced upon the argument.

Defendants' Exhibit the model of the mine at the time of Egan's examination, to be produced upon the argument.

1740

Defendants' Exhibit J.

Computation of ore in reserve and receipts received from Sigafus.

Egan's ore in reserve, 46,922 tons.

Exhaustion, Egan's report, 20 ft.

Both levels 950 feet long and 2 feet wide, including old workings and all allowances.

At two feet, 12, 76,000

6,333 tons.

6,333 tons.

Taking extreme figures in computation, these fig- 1741
ures allowing (this is about 4,000 tons).

Exhaustion is less than one-seventh of his reserve.

Multiplying, Sigafus mint,

Receipts,	$61,000
by 7	7
	$427,000

Amount of gold left in ground, Egan says was reserved if Sigafus had excavated as good ore as he left.

At 18 inches, deduct ¼ off,	1,583	
Old workings, 100 ft. sq.,	1,250	1742
	2,833	
Net,	3,500 tons.	

The above exhibits were received in evidence upon the trial, on behalf of the plaintiffs and defendant, as they respectively above appeared. Where such exhibits have been copied, the copies are, and each of them is, true and correct; and where the exhibits have been summarized, the summary given is a true and complete summary of such exhibits, 1743
and each of them. Dated New York,
1896. Defendant's Notice of Motion, dated April 16, 1896, to be taken in here.

DUDLEY PORTER *et al.*

vs.

JAMES M. SIGAFUS.

WALLACE, Circuit Judge:

The serious question upon this motion for a new
1745 trial is whether the instructions of the Court to the jury as to the rule of damages were correct. It has, at least, until recently, been the rule, settled by an overwhelming preponderance of authority, that in actions for deceit or breach of warranty the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or waranted to be. It is now urged that this rule no longer obtains in the Federal Courts, because of the controlling authority of *Smith* v. *Bolles*, (132 U. S., 125).

It is difficult to believe that the Court in that case
1746 intended to overthrow a well-settled rule without any discussion of the authorities. The case was plainly one for the reversal of the judgment below, and the application of the rule of damages which was said in the opinion of the Court to be the correct one, was unnecessary to the decision.

I conclude that the question can be more properly disposed of by an appellate court than upon this motion for a new trial.

The motion is denied.

CIRCUIT COURT OF THE UNITED STATES 1747

FOR THE SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and CHARLES W. MORSE,

Plaintiffs,

against

JAMES M. SIGAFUS,

Defendant. 1748

On reading and filing the notice of motion on behalf of defendant herein, dated April 16, 1896, and upon the minutes of Hon. William J. Wallace, United States Circuit Judge, before whom this action was tried, and upon the evidence adduced upon the trial thereof, and exceptions taken by the defendant on said trial and the verdict of the jury, the motion so noticed to set aside said verdict and grant a new trial in the above-entitled action upon said exceptions, and because said verdict is for excessive damages, and because the same is contrary 1749
to the evidence and against the weight of evidence, and because the same is contrary to law, and upon each and every of said grounds, and for other order or relief, coming duly on to be heard upon the 23d day of April, 1896; and after hearing Edmund Wetmore, Esq., of counsel for defendant, in support of said motion, and Albert Stickney, Esq., of counsel for plaintiffs, in opposition thereto;

Now, upon motion of Stickney, Spencer & Ordway, attorneys for plaintiffs,

Ordered, that said motion be and the same is hereby denied.

(Sd.) WM. J. WALLACE.

1750 To which ruling of the Court defendant, by his counsel then and there and before the entry of judgment herein, duly excepted, and prayed that his bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

Dated New York, N. Y., April 16, 1896.

It is hereby stipulated and consented that the foregoing bill of exceptions contains the proposed bill of exceptions and the amendments as allowed
1751 and settled, and that the same may be signed, sealed and filed as the bill of exceptions herein *nunc pro tunc* as of the day of the trial of the action.

STICKNEY, SPENCER & ORDWAY,
Attorneys for Plaintiffs,

NILES & JOHNSON,
Attorneys for Defendant.

1752

CIRCUIT COURT OF THE UNITED STATES, 1753

SOUTHERN DISTRICT OF NEW YORK.

DUDLEY PORTER, JOHN L. HOBSON and CHARLES W. MORSE,

Plaintiffs,

vs.

JAMES M. SIGAFUS,

Defendant. 1754

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the sixth day of January, 1897, before the Justices of the United States Circuit Court of Appeals for the Second Circuit, in the United States Post-office and Court House Building of the City of New York, came the said James M. Sigafus, defendant below and plaintiff in error, by Niles & Johnson, his attorneys, and in compliance with Section 997 of the Revised Statutes of the United States and of the rule of the Circuit Court of Appeals for the Second Circuit in that regard, 1755 and says:

That, by the record of proceedings aforesaid, there is manifest error in this, to wit:

FIRST.

In that the Court overruled each and every of the objections of the defendant, duly and seasonably taken, and allowed the following questions, and each of them, to be put to witnesses examined on behalf of plaintiff to be answered as follows:

1. By plaintiffs' witness Kingsbury.

"Q. At the time of said mill run did said Cheat-

1756 ham make any inquiries of you concerning certain sacked ore in the mine? If yea, state fully what he said in making said inquiries and what you said. A. He did ask me in regard to some ore in sacks that was in the stope in the first level near the second mainway north of the main shaft. Cheatham asked me if it was good ore, and I told him it was."

2. By plaintiffs' witness Kingsbury:

"Q. Do you know whether Cheatham saw the said concentrates or sulphurets concerning which you have been testifying to? If yea, when did he see them, who was present when he saw them, and
1757 what, if anything, did you hear him say about it? A. Before there was any mill run made, a month or two, Cheatham asked me one day in the stope, at the same time pointing it out to me, if I had noticed it, and I told him I had; the remark was made by one of us, 'It looks as if it had been put there.' There was no one else present besides him and me."

3. By plaintiffs' witness Miller:

"Q. If said Cheatham gave you any instructions or orders, state fully what he said. A. He told me to put some ore that was sacked in the chute."

1758

4. By plaintiffs' witness Cocking:

"Q. Did Cheatham give you any instructions as to what you should do during the mill run? If so, state what he said in giving said instructions and what you said at the same time. A. When I went down in the morning he told me not to send up anything until he came down; when he came down he took me around and showed me what chute he wanted me to run out of; he told me to run out of all the chutes except one when Egan was down in the mine, and I done it."

5. By plaintiffs' witness Cocking:

"Q. If, at any time during said mill run, Cheat-

ham had any talk with you about said account 1759
(meaning an account the witness had kept of carloads of ore run up), state fully what he said and what you said and all about it. A. Yes, sir; he did. He came down in the mine and wanted to know what in hell I was doing. I told him I was not doing anything but sending up ore and running the cars. He said I was sending up one car and marking down two; I told him I wasn't; then we had a little quarrel over it down there."

"Q. If Cheatham at any time did anything to your account that you kept on the tally-board of the carloads that were sent up, state fully what he did. A. Yes, sir; he did. He scratched off fifteen 1760
marks from my tally-board."

6. By plaintiffs' witness Cocking:

"Q. If said Cheatham, before Egan came to the mine and before the mill run was made, said anything about a purchaser coming to examine the mine, state fully what he said, how long before the said mill run that he said it, and where you and he were when he said it. A. Yes, sir; he told us there was a party coming here to see about buying the mine; that was one day at noon, when we were coming up the shaft, about half-way up; it was a few days before Egan came."

"Q. At the time referred to, if he gave you any 1761
order or instructions as to the workings in the stopes or preparing the stopes for examination, state fully what he said. A. Yes, sir; he told us this party was coming, and to get our places fixed up nice, and we done it."

7. By plaintiffs' witness Whitten:

"Q. Did you have any conversation with Cheatham during the mill run about your account (meaning the tally of cars) and the number of cars of ore that came up? If so, state it. A. He said my tally was not right, that it didn't tally with the boys below."

1762 "Q. If, during the mill run, Cheatham changed any of your tally-boards, state what change he made. A. There was a change made by Mr. Cheatham; he said I had too many cars; I don't remember how many he took off."

8. By plaintiffs' witness Whitten:

"Q. What instructions, if any, did Cheatham give you during the mill run as to what you should do? State fully what he said and what you said. A. Yes, sir; he told me to keep the skip cleaned out. Mr. Sigafus told me, when Cheatham was present, to keep the ore cleaned up on the platform where
1763 it had spilled off the car."

SECOND.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and allowed the following question put to James A. Kingsbury, a witness for plaintiff, to be answered.

"Q. Did you hear Cheatham say anything to any other person, or give any orders to any other person, about said ore that you had sorted? If yea, state what he said to the person about it, and who that person was. A. I heard Cheatham tell Bev. Bo-
1764 ven to sort it as he took it out of the chute into the car, that is the ore that I broke, and he did sort out close to a carload."

THIRD.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and allowed the following question, put to James B. Doran, a witness for plaintiffs, to be answered:

"Q. Are you able to state, with substantial accuracy, the average richness of the ore in the Good Hope Mine in November, 1893? A. Yes sir; the value was $8 per ton in free gold and a small value besides that in sulphurets; we called it $1.50 per ton."

FOURTH.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and allowed the following question put to James A. Kingsbury, a witness for plaintiff, to be answered. 1765

"Q. In your opinion, what was the value per ton of said sacked ore? A. It is pretty hard to put a value on it; in my opinion, it would run twenty dollars per ton or more."

FIFTH.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and allowed the following question, put to James B. Doran, a witness for plaintiff, to be answered: 1766

"Q. If you know what said Burnham did to make said report, or how he got the information from which said report was made, state what he did and how he got his information. A. Yes; I do know. He first measured the tonnage. He measured it every ten feet on the vein where the vein was exposed. He approximated on all ground, timbered and lagged up. He then sampled at each point measured; after that he assayed the samples taken, and the ground approximated in measurement was also approximated in value with that which was actually sampled. He did not make any mill test. His information he got from Mr. Sigafus and Mr. Bird. On that he framed his report. I saw him measure the pay streak with the rule. I also saw him make the measurement and take the samples. He measured the width of the pay streak, including the soft talc gouge which lay on the top and bottom side of the vein and was waste matter. In taking the samples he took the pay streak, but did not take any of the soft talc gouge." 1767

1768 SIXTH.

In that the Court overruled the objections of said Sigafus, defendant, duly and seasonably taken, and allowed the reading in evidence of the deposition of John M. S. Egan, a witness for plaintiffs, and the testimony of said witness to be so given and read to the jury. The following is the full substance of the evidence so admitted, so far as it adds to the papers received in evidence:

"I said to defendant that I was making the examination for the persons who had been associated in mining with me, Mr. Charles W. Morse and some
1769 of his friends; that the purpose of the examination was to verify the report called the Burnham report; that it had been called to my attention, and if the examination was satisfactory, that we would probably purchase the mine. Mr. Sigafus made me a sketch and gave me an oral explanation of it; he stated that the total depth of the main shaft was 416 feet; that at 250 feet deep a drift had been driven for about seven hundred feet and south about 250 feet to its intersection with the south shaft; that parallel levels had been driven at a point 100 feet further down the shaft; that the first shaft was 395 feet deep, and that
1770 the main shaft was 66 feet below the lower level. He did not say that any workings had been carried south of the south shaft; he gave me to understand, or stated that this sketch gave the full extent of the mine openings to the south. He said the first level north was being driven ahead, but in the second they were putting up a raise to connect with the blind drift that ran from the stope in that level. Sigafus asked me if I wanted 200 or 300 tons run in the proposed mill run. I told him I would like to, but I would only have time to run about 20 or 30. I made the arrangement for the mill run with with Mr. Sigafus and with his foreman Cheatham. The amount of ore was to be 61 cars, which we decided would be about equiv-

alent to 20 tons, and that the ore should 1771
be taken from all portions of the mine in the manner they were then taking. Both Sigafus and Cheatham said 20 tons were sent up. Sigafus showed me statements of four or five hundred tons run during the months of July, August, September and October, 1893; he had certificates showing that this bullion sold for ninety-six hundred dollars; he stated that was the lowest run he had ever had. I believed these statements. I handed the Burnham report to Charles W. Morse in December, 1893, in New York City. Of course I took a great many of Mr. Sigafus's statements in walking over the surface ground about the value 1772
of the ore; I had no reason to doubt any statement he made. I suppose I could have verified his statements if I got any statement from Sigafus; it was hard to get him to talk about the mine except by direct questions, and then he talked in a general way about its great richness and his reasons for selling, and it is a fact that I got data as to the main developments then in use and used them. I did verify Mr. Sigafus's statements to the best of my ability and with the means at my disposal. That verification was before the sale to Griffith. Mr. Sigafus didn't make any statements that were not true, but he neglected to tell me that the 1773
second level north was driven 80 feet further than apparent and the second level south 150 feet further than was apparent, and I don't believe now the ore from that mine averaged twenty dollars per ton since the working of the mine as he stated."

SEVENTH.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and allowed the following question put to John M. S. Egan, a witness for plaintiffs, to be answered.

"Q. What conversation, if any, did you have with Sigafus as to the Burnham report? A. At

1774 this distance of time I cannot recollect all our conversation regarding this report, but regarding this man Burnham, he showed me some photographs he had in his desk and told me Burnham was a mining engineer who had visited the mine at different intervals during one year or more, sometimes two weeks or a month at a time, that he had most thoroughly examined the property and was familiar with it; with regard to the figures giving bullion product, he said they were correct and that the books were in the possession of his son-in-law, Mr. Bird. I asked him about a great many details of the report, regarding the tonnage in 1891, and
1775 the titles to the claims, the iron ledge, and several claims near east boundary of the section, and the probability of the mine keeping on at that depth, etc., the porphy dyke and other matters contained in the report."

EIGHTH.

In that the Court overruled the objections of said Sigafus, defendant, duly and seasonably taken, and allowed the following questions and each of them put to John M. S. Egan, a witness for plaintiffs, to be answered.

1776 "Q. Did you ask Mr. Sigafus about the product of the mine in the year 1891, stated in the report at $57,000, at a cost of $15,000? A. As stated in my previous answer, I did, and he said the sales of bullion as carried out were correct.

Q. Did Mr. Sigafus tell you how long the mine had been worked; if so, what did he tell you on that point? A. As Mr. Sigafus and I had become very well acquainted with the history of the mine, and his own personal history was so mixed up with it, but from it all I gathered that he had it about three years.

Q. What, if anything, did he say as to the average value of the ore he had taken out himself, and the time during which he had taken it out? A.

He told me that up to the mill run of July, August, 1777
September and October of 1893, the average value had been $20 per ton of ore milled, but he had not milled much up to the erection of the Bryan mill.

Q. Do you mean that he had not milled much or had not taken out much? A. That he had not milled much.

Q. When did he say he had put in the Bryan mill? A. I think in 1891. I want to refresh my memory from the Burnham report. I cannot find it in the Burnham report, but I think it was in 1891."

NINTH.

1778

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and allowed the following question put to John M. S. Egan, a witness for plaintiff, to be answered:

"Q. From the statements to you of Sigafus and Cheatham, to which you have testified, and from the mill run as made, and from the appearance of the mine and the drifts on the second level, closed up as you have testified, did you or did you not conclude that the statements of the Burnham report were or were not accurate? A. I concluded that in the main details the statements in the Burnham report were accurate."

1779

TENTH.

In that the Court overruled the objections of said Sigafus, defendant, duly and seasonably taken, and allowed the following questions and each of them, put to John M. S. Egan, a witness for plaintiff, to be answered.

"Q. Assuming that the ore body of the Good Hope Mine had an average value of at least $17 per ton, and that the average width of the vein was 24 inches, that the length of the vein described by the workings was 950 feet, that the workings of the mine consisted of the main shaft 416 feet

1780 deep, and the south shaft 391 feet deep, the south shaft being 250 feet distant from the main shaft, with the drift in the first level at a depth of 250 feet from the surface—950 feet long—with the opening of from 4 to 5 feet wide, 5½ to 6½ feet in height, with the drift in the second level 350 feet below the surface—950 feet in length, with the opening of the same size, this drift in the second level running beneath the first for the entire length, and assuming that there was nothing at the end of the drift to indicate that the vein pinched out or disappeared, what, in your opinion, would have been the fair market value of this property? A.
1781 From $700,000 to $1,000,000.

Q. Assuming the same conditions, with these modifications, that the average value of the ore was $10 per ton; that the average width of the vein was eighteen inches, and that the conditions on the apparent ends of the drifts on the second level were such as you subsequently found them and have heretofore stated in this deposition what, in your judgment, was the fair market value of the property? A. About $50,000."

ELEVENTH.

1782 In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and received in evidence and allowed to be read to the jury the paper claimed by plaintiffs to be a copy of a Burnham report, and printed as Plaintiffs' Exhibit A, in the bill of exceptions.

TWELFTH.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and received in evidence and allowed to be read to the jury, Plaintiffs' Exhibit 2, the subscription paper of plaintiffs and associates dated December 18, 1893, to wit, the contents of the paper and the first four

names subscribed John M. S. Egan, Dudley Porter, 1783
John L. Hobson and Charles W. Morse.

THIRTEENTH.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and received in evidence and allowed to be read to the jury, Plaintiffs' Exhibit 2, the subscription paper of plaintiffs and associates and all the signatures thereon. "Know all men by these presents: That we whose names are hereto affixed do severally and respectively agree with Dudley Porter, of Haverhill, in the county of Essex and Commonwealth of Massachusetts, that we will sev- 1784
erally and respectively pay to the said Porter on the first day of January, 1894 (or as soon thereafter as he may require), the sums of money written opposite our several and respective names, amounting to the sum of one hundred and seventy-five thousand ($175,000) dollars, one hundred and fifty thousand ($150,000) dollars of which is to be applied as the first payment for the purchase of the Good Hope Consolidated Gold Mining property in California, being the same described in plan submitted by J. M. S. Egan, and consisting of two certain mining claims known as the 'Good Hope' and 'San Jacinto' and the 'Annex' mining lo 1785
cations, all being located in the Pinacate mining district, County of Riverside and State of California, together with all the mills, boilers, engines, silver plates and mining and milling equipments, car tracks, etc., on or appurtenant to or used in connection with the aforesaid property; and the remaining twenty-five thousand ($25,000) dollars is to be expended in the erection of a twenty stamp mill and such further development of the property as may be deemed necessary. The purchase price for said proprty is four hundred thousand ($400,000) dollars, and the balance of two hundred and fifty thousand ($250,000) dollars is to be paid as follows:

1786 One hundred thousand ($100,000) dollars on the first day of July, 1894, and one hundred and fifty thousand ($150,000) dollars on the first day of January, 1895; said payments of July 1st, 1894, and January 1st, 1895, to be secured by the obligation of the corporation formed or to be formed for the purpose of owning and mining this property, and by a first mortgage upon said property, but twenty-five thousand ($25,000) dollars of said payment of January 1st, 1895, shall be made by William H. Griffith, of Denver, Colorado, and in consideration thereof the said Griffith shall be entitled to one-eighth interest in and to said mining property.

1787 This subscription is made upon the condition that one hundred and seventy-five thousand ($175,000) dollars for the payment of January 1st, 1894, be fully subscribed, and that we do not hereby bind ourselves to pay the whole or any part of said payments of July 1, 1894, and January 1, 1895 (excepting that said Griffith shall make said payment of twenty-five thousand ($25,000) dollars.

And said Porter does hereby agree with the remaining parties to this agreement that the amount written opposite his name will be applied toward said first payment upon the terms and conditions herein expressed with reference to the other sub-

1788 scriptions.

It is hereby understood and agreed, by and between all the parties hereto that, in case a corporation be organized for the purpose of mining and owning said property, and the said property is conveyed to said corporation, said Griffith shall be entitled to receive one-eighth interest in and to the capital stock of said corporation in lieu of one-eighth interest in said property as herein provided for.

The subscribers further constitute and appoint Charles W. Morse and John M. S. Egan, their agents and attorneys, to make said first payment of one hundred and fifty thousand ($150,000) dollars,

upon evidence satisfactory to them of the title to 1789
said property, and upon terms which they deem
proper to secure proper conveyance of said property
to or for the benefit of the subscribers, and to form
or procure to be formed a corporation to own and
mine said property, and to carry into effect the pro-
vision that said Griffith shall have one eighth of
said property, or of the stock of said corporation as
herein provided, and to do any and all things neces-
sary and proper to vest the title to the remaining
seven-eighths of said property, or to the remaining
seven eighths of stock of the corporation formed or
to be formed as aforesaid, in the subscribers re-
spectively, in the respective proportions of their 1790
several and respective subscriptions.

Witness our hands and common seals
this eighteenth day of December,
A. D. 1893.

[L. S.]

John M. S. Egan, $10,000, ten thousand dollars.

Charles W. Morse, $15,000, fifteen thousand dollars.

Dudley Porter, $15,000, fifteen thousand dollars.

John E. Hobson, $15,000, fifteen thousand dollars.

Elbridge G. Wood, $15,000, fifteen thousand dol- 1791
lars.

Boyd B. Jones, $10,000, ten thousand dollars.

Chas. E. Wiggin, $5,000, five thousand dollars.

D. T. Kennedy, $5,000, five thousand dollars.

Thomas S. Ruddock, $5,000, five thousand dollars.

Austin E. Ruddock, $5,000, five thousand dollars.

George H. Carleton, $5,000, five thousand dollars.

Moody & Bartlett, $5,000, five thousand dollars.

H. L. Doyle, $3,000, three thousand dollars.

J. Otis Wardwell, $3,000, three thousand dollars.

1792 George H. Carleston, $5,000, five thousand dollars.

F. E. Hutchinson, $5,000, five thousand dollars.

John J. Winn, $2,500, twenty-five hundred dollars.

N. B. Newton, $5,000, five thousand dollars.

Geo. D. Morse, $1,000, one thousand dollars.

Wm. H. Floyd, $5,000, five thousand dollars.

Enoch H. Howes, $2,000, two thousand dollars.

Mellen A. Pingree, $2,000, two thousand dollars.

George C. Howe, $1,000, one thousand dollars.

1793 B. B. Jones, agt., $1,000, one thousand dollars.

Charles H. Poor, $1,000, one thousand dollars.

Kelly Bros., $5,000, five thousand dollars.

E. B. George, $1,000, one thousand dollars.

Geo. W. Gilbert, $2,500, twenty-five hundred dollars.

James F. West, $1,000, one thousand dollars.

Howard H. Gage, $1,000, one thousand dollars.

Maurice D. Clarke, $3,000, three thousand dollars.

Thomas E. Burnham, $1,000, one thousand dollars.

William H. Moody, $1,000, one thousand dollars.

1794 H. L. Dole, $2,000, two thousand dollars.

C. W. Morse by B. B. Jones, $3,000, three thousand dollars.

C. Howard Poor by B. B. Jones, $2,000, two thousand dollars.

Byd. B. Jones, trustee, $1,000, one thousand dollars."

FOURTEENTH.

In that the Court overruled the objection of Sigafus, defendant, duly and seasonably taken, and received in evidence and allowed to be read to the jury the following letter, Plaintiffs' Exhibit 15.

"GOOD HOPE MINE, 1795
Nov. 23, 1893.

C. W. MORSE, Esq.,

My Dear Sir:

I am now having 20 tons of ore that I have out from various portions of the mine, run through the little trap they have and shall get through to-morrow night. I have measured the ore bodies opened up and ready for stoping twice, as my first figures paralyzed me, but there is actually in sight nearly a million of dollars of gold, but ready to mill $797,000 worth. The gold is coarse and just as I told you in Denver, the mine seems made to order. You 1796
would have to be here on the ground to appreciate the situation, and unless you knew *all* the circumstances as I do, you would deem it incredible. All the mine needs is a 40-ton mill instead of a 6-ton. Even with this, it has paid from the grass roots, and paid a handsome dividend every month. Now, I telegraphed you as the matter must be pushed through as rapidly as possible. No stand-off nor talk will go with Sigafus—he wants to get away from here and get his daughter and children East. The son-in-law is in a Keeley institute at Los Gates.

I hope to hear from you on my return to Denver on the 30th. The price is too low for the property, 1797
and we must get a big slice. It can be made worth $2,000,000 in two years. I never saw such a proposition for the money.

With best regards,

Yours sincerely,

JOHN M. S. EGAN."

FIFTEENTH.

In that the Court overruled the objection of said Sigafus, defendant, duly and seasonably taken, and received in evidence and allowed to be read to the

jury the following letter of John M. S. Egan to one James H. Platt, dated at Good Hope Mine, November 21, 1893, in substance as follows:

"My opinion in the report is now fully confirmed by my examination, now in its sixth day. It is the mine that we have been looking for for years. It is a mine that can be worth a cool million, or two of them, in a year, by vigorous and proper management, and pay big from the word go. The circumstances narrated by Mr. Griffith as causing the sale of the property are absolutely true: An only daughter, a mine purchased for a worthless son-in-law in a Keeley Institute, practically incurable, and the old man's other big properties in Mexico shut down so he cannot attend to them, and cannot, or will not, leave the mine to go to the dogs. The purchase price of the mine is in evidence in one stope alone. The gold is free and coarse. The mill is a very rattle-trap, runs six tons a day, yet clears over a hundred dollars a day. It is a bonanza, absolutely. There is good reason for his selling. It is an opportunity that comes but once in a lifetime. We must meet somewhere to consult and arrange for a plan of campaign, and if not convenient for you to come to Denver with Mr. Morse, Griffith and I will go on East and meet you, but the game is worth the candle, well worth it."

SIXTEENTH.

In that the Court overruled the objections in each case of said Sigafus, defendant, duly and seasonably taken, and received in evidence, and allowed to be read to the jury: Letter from John M. S. Egan to Charles W. Morse, dated Perris, California, November 18, 1893, Plaintiffs' Exhibit 13; letter from John M. S. Egan to C. A. Roberts, dated Good Hope Mine, November 19, 1893, Plaintiffs' Exhibit 14; letter from John M. S. Egan to Charles W. Morse, dated Good Hope Mine, Plaintiffs' Exhibit 16; two telegrams, John M. S. Egan to

Charles W. Morse, dated Denver, Colorado, No- 1801
vember 29, 1893, Plaintiffs' Exhibit 17.

SEVENTEENTH.

In that the Court overruled the objections of said Sigafus, defendant, duly and seasonably taken, and allowed the following questions, put to Elbridge G. Wood, a witness for plaintiff, to be answered.

"Q. What papers were submitted to the investors so far as you know?

A. These two reports.

Q. And where you did not show the identical papers to the subscribers, did you make any state- 1802
ment to them, and if so, what, as to the contents of the papers?

A. I could not state any definite statement made to them from my recollection at the present time."

EIGHTEENTH.

In that the Court overruled the objections of said Sigafus, defendant, duly and seasonably taken, and allowed the following questions, put to William H. Griffith, a witness for plaintiffs, to be answered.

"Q. What was said as to your being, yourself, 1803
the purchaser, or as to what you would undertake to do in relation to the sale of the mine?

A. I told Mr. Sigafus at that meeting that I knew some people at Los Angeles to whom I thought the property could be sold, that they were people of standing, and claimed to have connections in the East ready to purchase the property immediately. A contract was drawn up between Mr. Sigafus and myself and dated, my recollection is, May 22, 1893, the contract calling for the sale of the property to me for $260,000.

Q. When you left the mining property what, if anything, did Sigafus say to you as to how or on what terms you might sell?

1804 A. On the way from the mine the morning I left Mr. Sigafus told me that I could sell the property on the best terms possible. I said we cannot get all the money down, as my contract calls for, but I believe these people have money; and I told him about a telegram that Col. Egan had sent to Morse. He said, make the best terms possible, and he would stand by it."

NINETEENTH.

In that the Court overruled the objections in each instance of said Sigafus, defendant, duly and 1805 seasonably taken, and allowed the following questions put to Eben E. Olcott, a witness for plaintiff, to be answered.

EBEN E. OLCOTT.

"Q. Assuming that the Good Hope Mine was opened up by two levels, each having a length of 950 feet, level No. 1 being 250 feet below the surface, and level No. 2 being 100 feet below No. 1, and on the same vein, each level being in the vein its entire length, and each level being connected with a main shaft which had a depth of 416 feet, and was in the vein at the bottom; and assuming 1806 that the ore in the mine was a continuous one the entire length of said levels, with an average width of 24 inches, and with an average value of at least $18, a ton, free milling gold, and that there was of said ore 44,733 tons in reserve, above the second level, and 37,333 tons in sight below the second level, and that the entire cost of mining and milling said ore, including all charges of whatsoever nature, would not exceed $7 a ton, that in a twelve months' mill run 2,434 tons of ore had been milled and mined from said mine, and had produced in bullion $57,897.78, being an average of $23.78 in free gold per ton, at a cost of $15,500; and assuming further that the Good Hope mining claims were 4,000 feet in continuous length, and in other respects were

not developed, and that the main shaft was in ore at its lowest depth, that the levels were in ore at their ends and throughout their length, and that there was nothing seen, visible, that afforded any reason for believing that the ore body did not continue in length and depth for an indefinite distance, what, in your opinion, was the fair market value on the first of January, 1894, of such a mine? 1807

A. From $902,000 to $1,375,000, based upon the two different sets of values given in the report and in your question.

Q. If an ore body 24 inches wide contains an ore reserve of 44,733 tons, how much would an ore body 18 inches wide, but of the same dimensions in other respects contain? 1808

A. Three-quarters as much; as eighteen is three-quarters of twenty-four, and that would be 33,000 tons."

TWENTIETH.

In that the Court overruled the objections in each instance of said Sigafus defendant, duly and seasonably taken, and allowed the following questions put to Eben E. Olcott, a witness for plaintiffs, to be answered:

"Q. Assuming that the Good Hope Mine was opened up by two levels, each 950 feet in length, level No. 1 being 250 feet below the surface, and 1809 level No. 2 being 100 feet below level No. 1, each being in the same ore body and connected with a main shaft 416 feet deep; and assuming that this ore had an average width of 18 inches, that it was not a continuous ore body, but pinched in and out in different places, so that one-fifth of the ground between the surface and the second level was barren ground; that beyond the north end of the apparent second level the level had been drifted, not less than 80 feet in barren ground, the vein lost and nothing to indicate it extended beyond said north end, and thereupon this opening into the barren ground had been closed up and concealed

1810 from view; and assuming also that beyond the south end of the apparent second level, that level for not less than 150 feet had been driven in barren ground, the vein lost and no indication that it extended further than said south end, and that this extension of the south end had been closed up and concealed from view; and assuming that the ore in reserve in said mine did not exceed 33,550 tons, without deducting any allowance for said barren ground; and assuming further that the ore in sight did not exceed in quantity 27,999 tons; and assuming also that the average value of the ore mined did not exceed $11 per ton, that the cost of mining
1811 and milling it was not less than $11 a ton, and that there was no reliable record of what it had done in the past, and that the mining claims of which this mine was a part were 4,000 feet in continuous length, and were developed only as herein stated—on these assumptions what, in your opinion, was the fair market value of the property, on the same date, January 1, 1894, including the mine?

A. I should say that such a mine was, commercially speaking, valueless, on the basis that it cost as much to extract the gold as the total product of the gold in the ore."

1812 TWENTY-FIRST.

In that the Court overruled the motion of said Sigafus, defendant, duly and seasonably made at the close of plaintiffs' case to dismiss the complaint, said motion being as follows:

"*Mr. Wetmore:* If your Honor please, I will state my motion to dismiss. I move to dismiss the complaint on the ground that the cause of action set forth in it has not been proved. The cause of action set forth in the complaint is, in substance, that the defendants, through one William H. Griffith, entered into negotiations with the plaintiffs for a sale to them of certain lands and mines, mining claims and appurtenances, and that prior to the

28th of December, the plaintiffs entered into nego- 1813
tiations for the purchase of said lands, and the defendant falsely and fraudulently represented to the plaintiffs the misrepresentations which have been stated by counsel for the plaintiffs in his opening, and did to the plaintiffs the fraudulent acts which are complained of.

I move to dismiss the complaint upon the ground that this cause of action has not been sustained.

First.—Because there is no proof sufficient to go to the jury that Mr. Griffith was in any way the agent of the defendant for the purpose of making the sale; but that it clearly appears that the relation 1814
was that of vendor and vendeed.

Second.—That the plaintiffs' sole contract, which was under seal, was with Griffith.

Third.—That at the time of Col. Egan's visit to the mine there was no relation existing or intended between the plaintiffs, Porter and Hobson and the defendant Sigafus; there is no evidence that at that time the plaintiffs, or either of them, had ever heard of Sigafus or of the Good Hope Mine.

1815

Fourth.—That there is no evidence sufficient to go to the jury that the document which has been called the Burnham report was the one to which Mr. Sigafus referred, and to which Col. Egan referred, both intending the same thing. Any document of that name that has appeared in the case in their relations has not been identified.

Fifth.—That there was no relation between the plaintiff Morse and Col. Egan at the time of Egan's examination of the mine, that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan.

1816 *Sixth*—That there is no evidence that the plaintiffs in this case, as set forth in the complaint, relied in any manner upon the statements which were made by Mr. Sigafus.

And I move to dismiss; first, as against the plaintiffs Porter and Hobson; secondly, as against the plaintiff Morse; and thirdly, for the reasons already stated, against the plaintiffs not named, whom these plaintiffs claim to represent."

TWENTY-SECOND.

In that the Court overruled the objection of said
1817 Sigafus, defendant, duly and seasonably taken, and received in evidence and allowed to be read to the jury, the paper purporting to be an agreement between said Sigafus and one J. Everett Bird, a stranger to the transaction, and one Walter S. Maxwell, a stranger to the transactions, dated November 7, 1892, and appearing in the bill of exceptions as Plaintiffs' Exhibit 36.

TWENTY-THIRD.

In that the Court denied the motion of said Sigafus, defendant, duly and seasonably made, to strike out the testimony of plaintiffs' witness, Eben E.
1818 Olcott. The full substance of this testimony appears above in assignments nineteenth and twentieth and the following summary:

"The $902,000 and $1,375,000 were based upon two different sets of values given in the report and in the first by hypothetical question; one a positive statement, is that the ore is worth at least $18 per ton, free milling gold, and that the value is taken in the calculations that are made on the various blocks of ore, estimated in reserve and in sight, on that basis, $18 a ton and $7 expenses, and on an amount of 82,000 tons which are estimated, 44,000 in one case and 37,000 in the other, it leaves a net profit of $11 per ton, or 11 times 82,000 equals

$902,000. That is entirely outside of the value in the future. The other value, leading up to $1,375,000, is based on the result of a mill run, giving the value of the actual product as $23.78 per ton, and the net of that would be $16.78, and 82,000 times this would be $1,375,000. 1819

There is no better way of determining the value and quantity of an ore reserve than by mining and milling it. It can be better determined by a year's mill run with one's own men than by a three days' run with employees of seller.

I arrived at this estimate by multiplying the number of tons of estimated ore in reserve and estimated ore in sight by the estimated value of free milling gold in each and subtracting the number of tons multiplied by the cost of extracting. It would take about four years to mill 80,000 tons. I do not estimate ore an inch further down than the lower level nor an inch further than the ends of the levels; in making a correct estimate ore below the bottom of the lower level should be thrown out. I am not talking about a correct estimate. 1820

When I say that mines have been sold on the basis of ore in sight I mean the correct practice as to ore in sight. Nothing is figured unless you can get to the four sides of it. If the stulling and lagging prevents examination of the roof of the levels I do not figure that as there would be no stulls there if there was ore. In case an expert did not break through the timbers and examine the roof of the tunnel he should not figure it as ore in reserve or in sight." 1821

TWENTY-FOURTH.

In that the Court denied the motion of said Sigafus, defendant, duly and seasonably made, at the close of the testimony, to dismiss the complaint, which motion was as follows:

"*Mr. Wetmore:* Also, to save my rights, I move now, at the conclusion of the evidence, to dismiss

1822 the complaint, upon the separate grounds already stated, and each and every of them, to wit:

1. That the cause of action set forth in the complaint has not been proved in favor of each or either or any of the plaintiffs:

2. That there is no proof, sufficient to go to the jury, that Mr. Griffith was in any way the agent of the defendants for the purpose of making the sale, but that it clearly appears that the relation was that of vendor and vendee; that the plaintiffs' sole contract, which was under seal, was with
1823 Griffith.

3. That at the time of Col. Egan's visit to the mine there was no relation existing or intended between the plaintiffs Porter, Hobson and Morse, and the defendant Sigafus; that there is no evidence that at that time the plaintiffs, or either of them, had ever heard of Sigafus or of the Good Hope Mine.

4. That there is no evidence, sufficient to go to the jury, that the document which has been called the 'Burnham report' was the one to which Mr.
1824 Sigafus referred, and to which Col. Egan referred, both intending the same thing. Any document of that name that has appeared in the case in their relations has not been identified; that there was no relation between the plaintiff Morse and Col. Egan at the time of Egan's examination of the mine that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan.

5. That there is no evidence that the plaintiffs in this case, or each or any of them, as set forth in the complaint, relied in any manner upon the statements which were made by Mr. Sigafus; that the

motion to dismiss is (1) against the plaintiffs, Porter and Hobson; (2) against the plaintiff Morse; and (3) for the reasons already stated against the plaintiffs, and each or either of them not named, whom these plaintiffs claim to represent." 1825

TWENTY-FIFTH.

In that the Court, against the objection of said Sigafus, defendant, duly and seasonably taken, charged the jury that there was some evidence that the plaintiffs relied upon the Burnham report, except as endorsed by Egan as follows: "Now, gentlemen, as applicable to the facts of this particular case, I instruct you that if the defendant authorized Griffith or Egan to use the Burnham report for the purpose of influencing prospective purchasers to buy the property, and they did use it, and the plaintiffs were induced by the belief in the truth of the facts therein stated to make the purchase, and the statements were false and known to be so by the defendant when he authorized the report to be made, that the plaintiffs are entitled to recover." 1826

TWENTY-SIXTH.

In that the Court, against the objection of said Sigafus, defendant, duly and seasonably taken, charged the jury as to measure of damages, as follows: "The measure of damages in actions of this nature is the difference of the value of the property as it proved to be and as it would have been as represented. You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the extent that the plaintiffs have been injured by one of the several representations, they are entitled to recover for that—that is, if you find the various issues of fact which I have left to your consideration in favor of the plaintiffs." 1827

1828 TWENTY-SEVENTH.

In that the Court refused to charge the said defendant's eighth request to charge, duly and seasonably made, which was as follows:

"The damages in this case must be limited to those suffered by the plaintiffs in this action, and cannot include damages to other subscribers to the stockholders' agreement not proved to have invested on the faith of Egan's endorsement of the Burnham report; no damages can be recovered, except for those individual plaintiffs."

1829 TWENTY-EIGHTH.

In that the Court refused to charge the said defendant's ninth request to charge duly and seasonably made, which request was as follows:

"If the jury find for the plaintiffs they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine when plaintiffs bought it must be applied in reducing or extinguishing the plaintiffs' loss, and charged upon the
1830 question of the measure of damages instead, as stated in assignment number twenty-sixth above."

TWENTY-NINTH.

In that the Court denied the motion of said defendant Sigafus, duly and seasonably made, to set aside the verdict of $330,275, in favor of plaintiffs, upon the minutes and the exceptions taken during the trial, made upon the ground that the damages are excessive.

THIRTIETH.

In that the Court denied the motion of said defendant Sigafus, duly and seasonably made, to set

aside the verdict of $330,275, in favor of plaintiffs, upon the minutes and the exceptions taken during the trial, made upon the ground that the verdict was contrary to the evidence. 1831

THIRTY-FIRST.

In that the Court denied the motion of said defendant Sigafus, duly and seasonably made, to set aside the verdict of $330,275, in favor of plaintiffs, upon the minutes and the exceptions taken during the trial, made upon the ground that the verdict was against the weight of evidence.

THIRTY-SECOND. 1832

In that the Court denied the motion of said defendant Sigafus, duly and seasonably made, to set aside the verdict of $330,275, in favor of plaintiffs, upon the minutes and the exceptions taken during the trial, made upon the ground that the verdict was contrary to law.

Wherefore, said James M. Sigafus prays for the reversal of the judgment below, and that a new trial be granted.

NILES & JOHNSON,

Attorneys for James M. Sigafus, defendant below and plaintiff in error. 1833

(Endorsed) U. S. Circuit Court, Southern District of New York—Dudley Porter, John L. Hobson and Charles W. Morse, plaintiffs, against James M. Sigafus, defendant — Assignment of Errors — Niles & Johnson, attorneys for defendant, 11 Wall Street, New York City—U. S. Circuit Court, filed Jan. 6, 1897, John A. Shields, Clerk.

1834 CIRCUIT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES M. SIGAFUS,

Plaintiff in Error,

vs.

DUDLEY PORTER, JOHN L. HOBSON and CHARLES W. MORSE,

1835

Defendants in Error.

Know all men by these presents, that we, the American Surety Company of New York, are held and firmly bound unto the above-named Dudley Porter, John L. Hobson and Charles W. Morse, in the sum of two hundred and fifty dollars, to be paid to the said Dudley Porter, John L. Hobson and Charles W. Morse; for the payment of which, well and truly to be made, we bind ourselves and our successors firmly by these presents.

1836 Sealed with our seal and dated the second day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named James M. Sigafus has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above-entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York;

Now, therefore, the condition of this obligation is such, that if the said James M. Sigafus shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea and writ of

error good, then this obligation shall be void; other- 1837
wise the same shall be and remain in full force and
virtue.

AMERICAN SURETY COMPANY
OF NEW YORK,

By DAVID B. SICKELS,
[SEAL.] *2d Vice-President,*

CORTLANDT S. VAN RENSSELAER,
Attorney.

Signed, sealed and delivered }
in the presence of }

1838

State, City and County of New York, ss.:

On this 2d day of January, 1897, before me personally appeared David B. Sickels, 2d vice president of the American Surety Company of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the City of New York; that he is the 2d vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Trustees of said company, and that he signed said instrument as 2d vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of the New York Session laws of 1893. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer, and knew him to be one of the attorneys of said company; that the signature of said Cortlandt S. Van Rensselaer, subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S.

1839

1840 Van Rensselaer, and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said David B. Sickels, 2d vice-president.

L. E. CARMAN,
Notary Public,
New York Co.

[SEAL.]

Cert's filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co's.

1841

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the fol lowing resolution was adopted:

"Resolved, That the presidents and vice-presidents be, and they hereby are, and each one of them is, authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance
1842 policies, and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

City and County of New York, ss.:

CORTLANDT S. VAN RENSSELAER, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute-book of said com-

pany, and do certify that the same is a correct and 1843
true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company, at the City of New York, this 2d day of Jany., 1897.

CORTLANDT S. VAN RENSSELAER,
[SEAL.] *Attorney.*

(Endorsed) Circuit Court of the United States for Southern District of New York—James M. Sigafus, plaintiff in error, *v.* Dudley Porter, John L. 1844
Hobson and Charles W. Morse, defendants in error —Bond for costs on writ of error—Approved January 6, 1897, E. H. Lacombe, U. S. Circuit Judge—Approved as to sufficiency of surety, dated New York, January 2, 1897, Stickney, Spencer & Ordway, attys. for deft. in error—U. S. Circuit Court, filed Jan. 6, 1897, John A. Shields, Clerk.

The United States of America, ss.:

To Dudley Porter, John L. Hobson and Charles W. 1845
Morse, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Second Circuit, to be holden at the City of New York on the third day of February, 1897, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein James M. Sigafus is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected,

1846 and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of New York this 6th day of January, in the year of our Lord, one thousand eight hundred and ninety-seven.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed) U. S. Circuit Court of Appeals, Second Circuit—James M. Sigafus, plaintiff in error, against Dudley Porter, John L. Hobson and Charles
1847 W. Morse, defendants in error—Citation—Niles & Johnson, attorneys for plff. in error, 11 Wall Street, New York City—Due and timely service of a copy of the within citation is hereby admitted. Dated January 6th, 1897—Stickney, Spencer & Ordway, attorneys for defts. in error—U. S. Circuit Court, filed Jan. 6, 1897, John A. Shields, Clerk.

1848

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Submitted November 12, 1897; decided January 7, 1898.

Before Judges Lacombe and Shipman.

JAMES M. SIGAFUS, Plaintiff in Error,
vs.
DUDLEY PORTER ET AL., Defendants in Error.

No. 10, October Term, 1897.

In error to the circuit court of the United States for the southern district of New York.

This cause comes here on writ of error to review a judgment in favor of the defendants in error (who were plaintiffs below) against the plaintiff in error who was defendant below. The judgment was entered upon the verdict of a jury. The action is one to recover damages for deceit by defendant inducing the purchase of a gold mine (real estate, improvements, plant and mining rights) by the plaintiffs. Much testimony was taken and the court left the cause to the jury under instructions that it was incumbent upon the plaintiffs to establish that the defendant had been the author of fraudulent representations or fraudulent concealments in respect to material matters affecting the value of the property; that it was the fraud which induced the contract, and that but for it the purchase would not have been made. The jury were further charged that "the measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented."

The facts material to the assignments of error sufficiently appear in the opinion.

LACOMBE, *Circuit Judge:*

Out of the thirty-two assignments of error, thirty have been supported by argument in this court. They may be arranged in seventeen groups, and are hereinafter discussed.

First. The exception reserved to the court's denial of the motion made *at the close of plaintiff's case* to dismiss the complaint is of no avail. By not resting on their motion, and by thereafter offering their own evidence, the defendants waived their motion. *Runkle v. Burnham* (153 U. S., 222).

This disposes of the twenty-first (21) assignment of error.

Second. Orders denying motions for new trials are not reviewable in the Federal courts. *Railroad Co. v. Fraloff* (100 U. S., 24). This disposes of the twenty-ninth, thirtieth, thirty-first and thirty-second (29, 30, 31, 32) assignments of error.

Third. Exception was duly reserved to the refusal of the court to dismiss the complaint at the close of the testimony, and is properly presented here by assignment of error.

To understand and dispose of this exception it will be necessary to some extent to set forth the facts. Defendant practically owned the mine, and had owned it for some time and there was evidence tending to show that he wanted to sell it. Some time in May, 1893, one Griffith met defendant and told him he knew of some people in Los Angeles to whom he thought the property could be sold. Thereupon a contract was made between them in form calling for the sale of the property to Griffith for a sum named therein. Griffith was unable to sell the mine to these parties and notified defendant to that effect, whereupon this contract terminated. On July 5, 1893, defendant and Griffith entered into a second contract under seal whereby defendant agreed to sell and convey the property to Griffith for $230,000. On August 24, 1893, they entered into a third contract also under seal referring to the second contract and to the fact that time was not of the essence of such contract, and providing that, in consideration of Griffith agreeing to make time the essence of said contract defendant would sell and convey and Griffith pay the $230,000

on or before January 1, 1894. It reserved to defendant the right and privilege at any time before January 1, 1894, to sell the property at not less than $230,000 ($115,000 cash at 30 days) in which event he would pay Griffith $5,000. It was further stipulated in the contract that Griffith should go immediately to New Orleans, and endeavor as agent for Sigafus to sell the property to parties named therein, for $350,000 or such other price as Sigafus might authorize Griffith to accept. In the event of effecting the New Orleans sale Griffith was to have 10 % as commission.

Subsequently to the making of this contract Griffith succeeded in effecting a sale of this property to plaintiffs for $400,000. Before this sale was effected one Egan, a mining expert had visited the mine, had seen Sigafus, had been furnished with what purported to be a report on the mine by another mining expert (Burnham) and had made an examination of the mine, and of a mill run conducted while he and Sigafus were there. Griffith associated Egan and a Colonel Platt with himself in the enterprise of selling the mine, the three to divide profits between them. Charles W. Morse was the first of the plaintiffs to hear of the mine, meeting Griffith, Platt and Egan in Denver in October, 1893, and there is evidence tending to show that it was in part upon his employment that Egan went to the mine to make his examination. Subsequently Morse brought the other two plaintiffs into the scheme, and after receipt of Egan's reports oral and written as to the mine, they on December 28, 1893, completed the purchase for the price named $400,000.

The complaint avers that previous to December 28, 1893, defendant through Griffith entered into negotiations with plaintiffs for a sale to them of said mine, and plaintiffs entered into negotiations for the purchase of said mine, and thereupon and in the course of said negotiations, the defendant falsely and fraudulently, and with intent thereby to deceive and defraud, made certain false representations &c. specifically set forth in the complaint. That thereafter and on December 28, 1893, plaintiffs believing said representations to be true and correct, and relying thereupon and induced thereby, purchased said mine.

In support of the motion to dismiss it is contended that there was no proof sufficient to go to the jury that Griffith was in any way the agent of the defendant to sell the mine, that it appears that the relation was that of vendor and vendee, and that plaintiffs' sole contract was with Griffith. Also that at the time of Egan's visit to the mine there was no relation existing or intended between the plaintiffs and Sigafus. In reply to this it might be sufficient to say that an action for false representations will lie against the falsifier whether the sale thereby induced is of his own property or of another's. The court accurately expressed the theory upon which recovery was had, in the charge to the jury.

"The plaintiffs claim that they were induced to make the purchase in consequence of false representations made to and fraudulent devices practiced on Egan by the defendant, while Egan was making the examination of the property, whereby Egan was led to believe the Burnham report to be true, and other facts to be true afterwards incorporated into a report made by himself; that the defendant practiced these frauds on Egan, knowing him to be acting in the interest of prospective purchasers, and expecting that he might mislead them by giving them incorrect information contained in the Burnham report and his own report about the property; that Egan did give the erroneous information to the plaintiffs; did corroborate to them the statements in the Burnham report, and that the plaintiffs relying upon the truth of the various facts stated in that report and in Egan's report, purchased the property. If the jury find this theory to be established by the evidence, the defendant is responsible to the same extent that he would be if he had personally misrepresented the facts to the plaintiffs and personally misled them by fraudulent practices."

There was no objection taken or exception reserved to this part of the charge. Had defendant at the trial insisted that the case thus submitted to the jury was variant from that set out in the complaint (and we do not now decide whether it was or not) the complaint might have been amended to conform to the proof; and indeed such amendment might now be made, if it were necessary. But there was abun-

ant evidence to sustain the verdict upon the theory that Sigafus was in fact undertaking to sell his own mine through the agency of Griffith. He held the title until the plaintiffs paid the money; the testimony fairly warrants the inference that when he made the contract of sale to Griffith (which he himself in his testimony refers to as a *bond*, fol. 892) he knew that Griffith had no money to buy the mine with, and that the contract would be valueless and void, as the earlier one was, unless Griffith found some real purchaser, in Los Angeles, or New Orleans, or the East, or elsewhere. There was testimony in the record, quite sufficient, if the jury believed it, as they did, to indicate that Sigafus had very good reason for keeping his own personality as much as possible in the background, when the mine was to be offered for sale to a *bona fide* purchaser. Griffith testified that, on the day he left the mine, after the last contract was made, to look for a purchaser, Sigafus told him he could sell the property on the best terms possible; that he (Griffith) told Sigafus that he could not get all the money down as his contract called for, but that he believed "these people have money, and told him about a telegram Colonel Egan had sent to Morse. He (Sigafus) said, make the best terms possible and he would stand by it." It would have been manifest error to take the case from the jury in the face of such evidence, and if defendant wished to have the attention of the jury more specifically directed to his theory of what the proof showed, he should have asked for instructions.

A further ground on which motion was made to dismiss was that "there was no relation between the plaintiff Morse and Colonel Egan at the time of Egan's examination of the mine that would enable Morse, any more than the other plaintiffs to hold the defendant liable for the statements made to Egan." It will be a sufficient reply to this proposition to refer to the testimony of Morse, Griffith and Egan to the effect that Egan went to the mine to make his examination upon the employment of Morse and Platt.

The other propositions advanced in support of the motion to dismiss deal with the evidence generally, it being contended that there was no proof of false and fraudulent repre-

sentations made by defendant with intent to induce the sale, which were material and were relied upon by plaintiffs. It would be a waste of time to enter into any discussion on this branch of the case.

What credit was to be given to the story of particular witnesses, how satisfactory might be the explanations offered of some of defendant's letters were questions for the jury to pass upon; but to contend in the face of the evidence of Doran and his wife, of Egan, Morse and Hobson, and of the cross-examination of the defendant himself, that there was no evidence to go to the jury is preposterous.

There was no error, therefore, in denying the motion to dismiss.

This disposes of the twenty-fourth (24) assignment of error.

Fourth. Defendant excepted to as much of the charge as instructed the jury that "if defendant authorized Griffith or Egan to use the Burnham report for the purpose of influencing prospective purchasers &c. &c. plaintiffs are entitled to recover," on the ground that there was not sufficient proof to go to the jury, that defendant authorized either Griffith or Egan to use such report for such purpose. If it be assumed that Griffith was in reality defendant's agent to sell, and as has been shown there was evidence tending to establish that relation, it would be a perfectly fair inference that when Sigafus gave him the Burnham report he expected and intended that it should be used to help the sale. But we need not even make this assumption. There was abundance of evidence tending to show that the Burnham report which was put into Egan's possession came originally from Sigafus through Griffith; that when he came to the mine Egan told Sigafus that he was to make an examination for Morse and others and that one purpose of the examination was to verify the Burnham report; that they (Egan and defendant) had subsequent interviews in which this report was referred to and Sigafus stated that certain parts of it were correct. The exception is wholly without merit.

This disposes of the twenty-fifth (25) assignment of error.

Fifth. Plaintiffs sued in behalf of themselves and their associates jointly interested and associated with them in the enterprise. The evidence shows that from the beginning what they contemplated was the formation of a company to which the mine should be turned over and which should be composed of such of their friends as might be inclined to take an interest in the enterprise, and that a number of persons other than plaintiffs, some prior and some subsequent to the consummation of the sale, signed a subscription paper which pledged them to take and pay for the respective interests therein set forth. Although the plaintiffs were the only persons appearing at the final transfer of the property from defendant, the real parties in interest were those who had thus united in the purchase, and we know of no reason why under section 449 of N. Y. Code of Civil Procedure suit could not be maintained by the plaintiffs, with whom the negotiations were had and to whose agent the representations were made to recover the entire damages, which when received they would have to distribute ratably among their associates. This disposes of various exceptions to the admission of evidence, and to the charge and refusals to charge, which are set forth in the twelfth, thirteenth and twenty-seventh (12, 13, 27) assignments of error.

Sixth. Exception was taken to testimony given by some of plaintiffs' witnesses tending to show a falsification by one Cheatham of the mill run which was had as part of Egan's examination, on the ground that Cheatham's acts were not sufficiently connected with defendant. Cheatham was defendant's foreman of the mine, introduced by him to Egan as the man who would "give him every assistance in his power;" defendant was himself present and overseeing whatever was going on while Egan was there. The falsification of the mill run was accomplished in part by bringing up from the levels some sackfuls of peculiarly rich ore, which had been mined before, and there was direct evidence, fortified by letters of the defendant, tending to show that that rich ore was put in those sacks and laid away by his express direction "to be used in case prospect-

ive buyers exacted a mill test." There was also direct evidence tending to show that Sigafus himself falsified this same mill run by throwing in valuable specimens of rich ore not brought up from the workings while the mill run was going on. Naturally enough Cheatham testified that he did not falsify the mill run, and Sigafus that he did not direct or authorize Cheatham to do so, but there was sufficient in the case to warrant the jury in finding the converse to be the truth; and, that being so, the evidence as to actual falsification under Cheatham's direction was admissible.

This disposes of the first and second (1, 2) assignments of error.

Seventh. One James B. Doran a witness called for plaintiff was asked this question: "Are you able to state, with substantial accuracy the average richness of the ore in the Good Hope mine in November, 1893?"

This was objected to as "incompetent and as calling for an opinion." It is a subject as to which the opinion of experts is proper testimony, and Doran was certainly qualified to express an opinion since he had been a practical miner for 24 years, having "done nearly everything from tool boy up to superintendency," and had been in charge at defendant's mine from August, 1889 till he fell sick in August, 1893. It is now contended that his testimony should have been excluded because it does not appear that he was in the mine after he was taken sick in August. No such specific objection was made at the trial, and it is apparently an afterthought of counsel. Had it been duly taken, however, we are still inclined to hold the exception unsound. The evidence pretty clearly indicates that under Sigafus' methods of having the mine worked there was not much chance of any material change in three months, and although there is no evidence to show that Doran was in the mine in November, there is no evidence to show that he was not, and for aught that appears he saw the ore which came out of the mine, even if he did not go down into it after his sickness in August. His opinion as to the value of the ore was admissible; what consideration

should be given to it was for the jury. We prefer however to put our decision as to this exception on the ground that the objection was not fairly called to the attention of the judge who tried the cause. The stock objection "incompetent irrelevant and immaterial" covers a multitude of sins; there is hardly an objectionable question but what can be classified under one or other of these heads. Sometimes the real nature of the objection is so plain that the general phrase will be quite sufficient to indicate it; indeed it may be quite apparent without any statement of the grounds of objection at all. But there are many other objections which rest upon some particular theory of the case, or upon some single fact in proof which a judge may readily forget in the course of a long and intricate trial. It is only fair in such cases to require counsel to state clearly to the trial judge on what ground it is that they object. Certainly it is not fair to allow such a general drag-net as "incompetent, irrelevant and immaterial" to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel upon careful analysis of the printed narrative of the trial to formulate some specification of error not thought of at the time, and which if seasonably called to the court's attention might have been avoided or corrected.

This disposes of the third (3) assignment of error.

Eighth. An exception to the admission of a similar question to one Kingsbury as to the value of the ore in sacks is disposed of in the like manner. Incidentally it may be noted that at the time the question was asked it appeared that Kingsbury was a miner of several years' experience; no request was made to be allowed to cross-examine him as to his qualifications as an expert before taking the answer. Subsequent cross-examination developed the fact that he had never made an assay of this ore, nor pounded it in a mortar, nor panned it, circumstances which are now relied upon to support the assignment of error. But no motion was made, after cross-examination, to strike out the evidence; and the point now raised was never called to the attention of the circuit judge, who of course, ruled upon

the original objection solely in the light of the testimony as it stood when the objection was raised. This assignment of error is also apparently an afterthought.

This disposes of the fourth (4) assignment of error.

The fifth (5) assignment was withdrawn on the argument.

Ninth. Objection was interposed to the entire deposition of Egan on the ground that "there is no evidence in the case that Egan represented the plaintiffs, or that there existed at that time between Egan and the plaintiffs any engagement or even any knowledge of each other." This objection was sufficiently disposed of by the evidence of Morse, Griffith and Egan himself that the latter went to the mine to examine it on the employment and at the request of Morse.

This disposes of the sixth (6) assignment of error.

Tenth. Upon his direct examination Egan was asked: "What conversation if any did you have with Sigafus as to the Burnham report?" Objection was taken on the ground that "there is no evidence thus far introduced in the case as to what the Burnham report was." Whatever deficiency there may have been in the proof at the time this question was asked, there was abundant evidence before the case closed to warrant a finding that the particular "report" as to which Egan had conversed with Sigafus was one sent out by the latter containing additions to the original report, which additions included statements which defendant's counsel on the trial admitted to be fabrications. The exception reserved is without merit.

This disposes of the seventh (7) assignment of error.

Eleventh. The various objections to testimony set forth in the eighth and ninth (8, 9) assignments of error are based on the proposition that Egan did not represent the plaintiffs. The remarks in subdivision *fourth* of this opinion *supra*, sufficiently dispose of them.

Twelfth. The hypothetical questions put to the witnesses Egan and Olcott, which were framed so as to elicit testimony tending to show the value of the property had it been as plaintiffs' evidence tended to show it was represented and

its value as it really was, have been carefully compared with the evidence and in our opinion are fairly within the rule which authorizes counsel to "assume the existence of any state of facts which the evidence fairly tends to justify." It might be that plaintiff- would not succeed in convincing the jury that Sigafus was substantially the father of the altered and fabricated edition of the Burnham report, which he sent out, and about which Egan testifies that he talked to him; but certainly there was evidence tending to connect this edition with the defendant. And the "hypotheses" in the questions are in accordance with the statements in such report. Incidentally it may be noted that the jury apparently did not accept the valuation elicited by these questions, but rather fixed upon the price paid as a fair value of the property if it had been as represented.

This disposes of the tenth, nineteenth, twentieth and twenty-third (10, 19, 20, 23) assignments of error.

Thirteenth. In view of the testimony already referred to, the objection reserved in the eleventh (11) assignment of error that Plaintiffs' Exhibit A,—the fabricated edition of the Burnham report which Egan had,—was not sufficiently identified to warrant its being read in evidence, is without merit.

Fourteenth. Certain letters of Egan to Morse and Platt (including one to Roberts, Platt's secretary) were put in evidence to which defendant duly objected as "not binding on defendant and as immaterial, irrelevant and incompetent." No claim is made that they were "binding on defendant;" it is the other grounds of objection only that need be considered. The letters were written while Egan was conducting his examination at the mine. The action is to recover damages for false and fraudulent representations alleged to have been made by defendant, and in reliance upon which representations the plaintiffs purchased the mine. As matter of fact the defendant and plaintiffs never met (until the day title was passed). It is evident therefore that plaintiffs must show some conveyance of the representations from defendant to plaintiffs. This they undertook to do by proving that Sigafus deceived Egan, that Egan relying on Sigafus'

misrepresentations made a most favorable report to his employers, upon the strength of which they bought. Manifestly to do so they would have to establish two entirely separate propositions, one the misrepresentations by Sigafus to Egan, and the other the reproduction in some form of those misrepresentations by Egan in his report to his employers. It is practically conceded that Egan's report was competent, relevant and material, no objection was interposed to its reception. Supplemented by the testimony of plaintiffs it tended to show on what they relied when they decided to purchase. Whether this report contained material misrepresentations, which were induced by fraudulent representations or concealments of Sigafus, which misled Egan was a question to be established by other proof, but when established the chain of proof would be complete. The court correctly charged the jury that if they believed the plaintiffs "were influenced by Egan's corroboration of the Burnham report, *and by his own report*, then the important question is whether Egan was deceived and misled by the defendant and whether he (defendant) *falsely represented to him* (Egan) *the facts stated* in the two reports." But if Egan's "report" on the mine was admissible it is difficult to see why these other written descriptions sent by him to his employers of what he found there, and of what was the present appearance, and past history of the mine are not equally so. It would be for the jury to determine whether any material false statements in them were induced by fraudulent misrepresentations by defendant, relied upon by Egan. Any sentences in the letters not thus material or relevant might have been excluded from the jury, had attention been called to them specifically; but as a whole each letter was admissible as a part of Egan's report to his employers, upon which there was evidence tending to show that plaintiffs relied in making their purchase.

This disposes of the fourteenth, fifteenth and sixteenth (14, 15, 16) assignments of error.

Fifteenth. Exception was reserved to testimony of the witness Wood that the two reports (Burnham's and Egan's) were submitted to the investors. In view of the opinion

already expressed it is unnecessary to discuss this exception. Exception was also reserved to a question to the same witness whether he made any statements to them as to the contents of the papers,—upon the ground that such statements were not brought home to defendant. Inasmuch as the witness replied that he could not recollect that he made any definite statement to them, any discussion of the sufficiency of the objection would be a waste of time: the answer was harmless.

This disposes of the seventeenth (17) assignment of error.

Sixteenth. It will be remembered that in support of plaintiffs' contention that Griffith was in reality the agent of Sigafus to sell the mine, Griffith was allowed to testify that on the day he left the mine, after the last contract was made, to look for a purchaser, "Sigafus told him he could sell the property on the best terms possible;" that he (Griffith) said to Sigafus "We cannot get all the money down as my contract calls for, but I believe these people have money; and I told him about a telegram that Col. Egan had sent to Morse." And that he (Sigafus) said "make the best terms possible and he would stand by it."

This was objected to as incompetent and exception reserved. The ground of the objection is that plaintiffs could not, by the testimony of one of the parties thereto, vary the terms of a written contract under seal. If this were an action upon the contract under seal by Sigafus against Griffith, or by Griffith against Sigafus there would be force in the objection that neither party could vary its terms by parol testimony; but we know of no principle of law which precludes a third person, who is suing one of the parties to a sealed instrument upon a cause of action not arising upon such sealed instrument, from showing that the instrument was in fact a mere device concocted to mislead outsiders dealing with one or other of the parties to it, and not truly representing the relations between these parties.

This disposes of the eighteenth (18) assignment of error and the twenty-second was withdrawn on argument.

Seventeenth. The only remaining assignments of error are the twenty-sixth to so much of the charge as instructed the

jury that the "measure of damages is the difference between the value of the property as it proved to be and as it would have been as represented," and the twenty-eighth to the refusal to charge substantially that the measure of damages is the money plaintiffs had paid out for the mine with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it. In view of the recent opinion in *Smith vs. Bolles* (132 U. S., 125), this court desires the instruction of the Supreme Court for its proper decision of the question arising upon these two assignments of error. A certificate in the form required by the act of March 3d, 1891, has, therefore, been prepared and will be forwarded to the Supreme Court. The fact that instructions are thus desired as to a single question out of the many arising upon this writ of error affords no sufficient ground for withholding the decision of this court as to the other questions in the cause. *Compton v. Wabash R. R. Co.* (31 U. S. App., 486). This opinion is therefore placed on file and when instructions are received as to the questions certified the cause will be finally disposed of.

Edmund Wetmore and *Joseph H. Choate*, for the plaintiff in error.

Albert Stickney, for the defendants in error.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 631, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James M. Sigafus, plaintiff in error, against Dudley Porter *et al.*, defendants in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 5th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

{ Seal United States Circuit Court of Appeals, Second Circuit. }

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 6, 5, '99. W. P.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which James M. Sigafus is plaintiff in error and Dudley Porter *et al.* are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 259, October term, 1898. James M. Sigafus *vs.* Dudley Porter *et al.* Writ of certiorari. United States circuit court of appeals, second circuit. Filed Jun- 3, 1899. Wm. Parkin, clerk.

Endorsed on cover: File No., 16821. Supreme Court U. S., October term, 1899. Term No., 48. James M. Sigafus, plaintiff in error, *vs.* Dudley Porter *et al.* Writ of certiorari and return. Filed June 16, 1899.

No. 259. A.D.
Brf. of Wetmore & Johnson for
MAR 17 1899
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Filed Mar. 17, 1899.

JAMES M. SIGAFUS,
Plaintiff in Error,
vs.
DUDLEY PORTER ET AL.,
Defendants in Error.

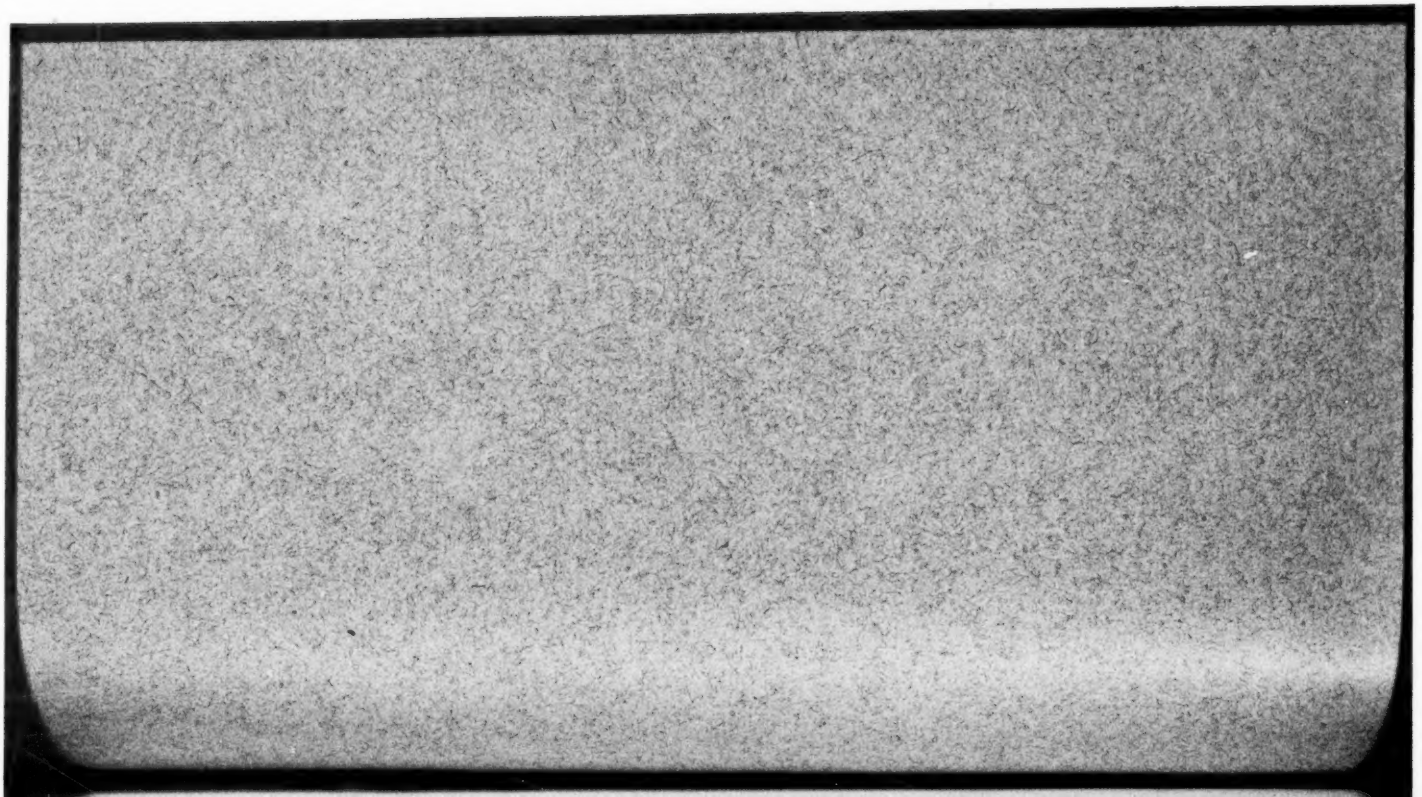
No. 259.

Brief of Plaintiff in Error

upon question certified by the Circuit Court of Appeals for the Second Circuit.

EDMUND WETMORE,
HENRY B. JOHNSON,
Counsel for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, New York.



C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

UNITED STATES SUPREME COURT.

JAMES M. SIGAFUS,
Plaintiff in Error,

AGAINST

DUDLEY PORTER, ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

upon question certified from the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This was an action by defendants in error, Dudley Porter and others, plaintiffs below, against the plaintiff in error, James M. Sigafus, defendant below, to recover damages for deceit in inducing the defendants in error to purchase a gold mine.

The cause came before the Circuit Court of Appeals for the Second Circuit upon a writ of error to review a judgment in favor of the defendants in error. Two of the assignments of error related to the rule as to the measure of damages, and the question certified to this Court is for the purpose of obtaining the instruction of this Court as to the proper measure of damages in this case.

The action was one in tort for deceit or false representation simply, and contained no element of warranty.

The subject of the alleged deceit was a gold mine. The result of it, the inducing of defendants in error to purchase the gold mine.

The false representations complained of, and found by the jury upon the evidence submitted to it, had respect to the past history of the mine, its condition at the time of the sale, and its estimated value.

The value of the property by its very nature was speculative and uncertain.

For the purpose of enabling the jury to measure the damages the opinion of expert witnesses was submitted as evidence of what would have been the value of the mine had it been such as it was represented to be —*i. e.*, if its history or past production, and its condition at the time of the sale, and the estimated value of the rock that had not been worked, had been such as defendants in error believed, relying upon the representations and devices of plaintiff in error.

In other words, the evidence submitted to the jury upon this point had respect to what—assuming that the representations were false—a gold mine that did not exist, except in the imagination, was worth as a speculation.

There was no conflict as to what was paid for it and laid out upon it by the plaintiffs below in order to develop it, and there was evidence as to what it was actually worth at the time of the purchase.

QUESTION CERTIFIED.

What is the proper measure of damages to be applied in assessing plaintiffs' recovery. Is it

(a) The difference between the value of the property as it proved to be and as it would have been as represented ; or

(b) The money plaintiffs had paid for the mine, with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it ?

ARGUMENT.

I.

Fundamental Principles.

We submit that the following are fundamental principles as to the measure of damages for false representations :

1. The damage to be recovered must always be the natural and proximate consequence of the act complained of.

Greenl., Vol. II., Sec. 256.
Smith vs. Bolles, 132 U. S., 130.

This is stated in Bushman and Cooke vs. Codd (53 Md., 202), as " Plaintiff is entitled to recover such damages as are the natural and necessary result of the false representations."

2. Damages which are uncertain, contingent or speculative, are not recoverable.

" Damages are not recoverable for the loss of purely speculative benefits that can be estimated by no certain standard."

Fitzsimmons vs. Chapman, 37 Mich., 139.

" The probable or possible benefits of a voyage as yet *in fieri*, can never afford a safe rule by which to estimate damages in cases of marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its applica-

tion, and so many difficulties in sustaining its legal correctness, that the Court cannot believe it proper to entertain it."

The Annable Nancy, 3 Wheat., 546.
La Armistad de Rues, 5 Wheat., 385.

"But these cases (*i. e.*, trespass), where damages are claimed, not on the ground that they were or should have been foreseen, but simply as the direct result of the breach, are subject to the limitation of the rule which requires such damages to be certain and direct."

Bowas vs. Pioneer T. Line, 2 Saw., 30.
Smith *et al.* vs. Condry, 1 How., 24.

In an action for deceit in the sale of mining stock, the Court says :

"His damages should equal the loss which the deceit inflicted. The loss in the transaction before us is the difference between the real value of the stock and the fictitious value at which the buyer was induced to purchase.

"His actual loss does not include the extravagant dreams which proved illusory, but the money he has parted with without receiving an equivalent therefor."

High vs. Berret, 148 Pa. S., 261.

Upon this point, also,

Fitzsimmons vs. Chapman, 37 Mich., 139.

II.

The determination, therefore, as to how damages in this particular case are to be measured, apparently turns upon the point as to what are the natural and proximate damages, or the natural and necessary damages, eliminating such as are uncertain, contingent or speculative.

In the certified question, the Circuit Court of Appeals asks which of two alternative rules is to be applied to this case. The first of the alternatives is, are plaintiffs' damages in this case the difference between the value of the property as it proved to be and as it would have been as represented.

There will be no controversy, we apprehend, that the value of the property as it proved to be is one of the elements in measuring the damage. From what sum or value, then, is the actual value of the property to be subtracted in determining the natural and necessary or proximate damage, with the degree of certainty required by the second rule?

Is it to be subtracted from the price paid and other outlay legitimately attributable to defendant's fraudulent conduct—in other words, all that the purchasers were deprived of, or is to be subtracted from what is denominated in the question "the value of the property as it would have been as represented."

There can be no question that the money paid, with interest, and any other outlay legitimately attributable to defendant's conduct, less its actual value when bought, is a proximate, necessary and certain damage, resulting from the false representation. The real question is, therefore, can plaintiffs recover a further sum as damage, provided the value of the property as it would have been as represented exceeded the price paid?

This raises the inquiry whether such further sum represents any portion of the proximate damage to plaintiffs; and second, what sort of value as to certainty could be predicated upon the representations claimed to have been made in this case.

Upon this point we submit that the statement of facts is insufficient, and that it is desirable for its proper determination that there should be before the Court a more particular statement of the nature of the representations, of the facts as to the character and condition of the property, and the examination of it

by the purchasers, and as to the testimony or estimate of value predicated upon the alleged representations.

Assuming, however, that the statement of facts is sufficient, we submit, with respect to this inquiry:

FIRST. Plaintiffs claim that they were fraudulently induced to purchase, and that they relied upon the false statements and purchased and paid a certain sum of money for the property and a certain sum to develop it, and, retaining the property, sue for their damage.

What did they lose? And how were they damaged?

The proximate and necessary result of the deceit was the purchase and payment and the expenditure afterwards legitimately attributable to it. They could not have lost what they hoped to make, because they never had it to lose.

SECOND. What sort of value other than the agreed price between the parties could be predicated upon the representations claimed to have been made?

The value of property may be either its market value or its utility or intrinsic value. By its very nature a gold mine is a speculative venture and not an article of ordinary merchandise, and has, therefore, no market value as grain, cotton, horses or farm land or city lots are said to have a market value. The value of a gold mine other than that stipulated in an agreement can be only what the mine will prove to produce or be worth for working.

The character of the mine, and its intrinsic value, depend, for one factor, upon the contents of the rock hidden behind the faces of the openings into it. Behind these faces the senses of man cannot go; and it cannot be assumed that what threads of gold, what nuggets, and what barren rock these faces may hide, can be determined with any reasonable certainty from representations as to the history of the mine, and its condition—*i. e.*, as to what gold has been taken from the rock removed in making the openings, and the

present dimensions, and appearance of the faces of the openings.

The recovery, therefore, by the plainfiffs of a sum far in excess of the entire purchase price of the property, and all outlays upon it by them cannot, be assumed to be other than the recovery of a certain portion of the hoped-for profits of an unrealized speculation.

This Court has, we submit, in a substantially similar case, fixed the application of these fundamental principles as to the measure of damages to such cases. We refer to the case of *Smith vs. Bolles*, 132 U. S., 125.

The action was an action for deceit brought by the plaintiff to recover damages for alleged fraudulent representations in the sale of shares of mining stock. The misrepresentations consisted in false and fraudulent statements by the defendant respecting a variety of facts existing in respect to a certain silver mine which was the basis of the company formed to purchase it, and the shares in which were bought by the plaintiff in reliance upon said representations. Plaintiff then alleged that the stock and mining property were wholly worthless, and that, had the same been as represented by the defendant, the stock would have been worth at least ten dollars per share. The price which the plaintiff paid was a dollar and a half a share. The complaint contained other counts of other stockholders who had been defrauded in like manner, and who had assigned their claims to the plaintiff. The damages claimed were sixty thousand five hundred dollars, which was the value of the property if it had been as represented.

Two of the assigned causes of action founded on the claims of Bolles and Manchester originally sought merely a rescission of the contracts, and to recover back the money they had respectively paid; but, by amendment, "their causes of action were changed to counts for the recovery of damages rasulting to the said Bolles and Manchester from the alleged false and fraudulent representations."

It will thus be seen that the case was purely an action for deceit for fraudulent representations, the damages claimed being the value of the property as represented over its actual value, which was said to be nothing.

The Court on the trial charged the jury that "the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be, or, in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant and as may be shown in the evidence before you."

Upon this the Supreme Court held as follows (italics ours):

"In this there was error. The measure of damages was *not* the difference between the contract price and the reasonable market market value if the property *had been as represented to be*, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it *would have had* if the property had been *equal to the representations*. What the plaintiff might have *gained* is not the question, but what he had *lost* by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been make in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent

conduct; but this liability did *not* include the expected fruits of an unrealized speculation. *The reasonable market value, if the property had been as represented*, afforded, therefore, *no proper element of recovery.*"

In England the question was discussed in the High Court of Chancery, and the rule in Smith vs. Bolles adopted, in the case of

Peek vs. Derrick, L. R. Chan. Div., 541, 591–4.

The action in that case was for deceit. The directors for a proposed new tramway company running out of Plymouth set forth a prospectus saying that they had a right to run the road by steam or mechanical power and were not confined to horse power. Plaintiff Peek testified that he was well acquainted with the traffic that might be expected on the road, "and, having this steam power, it made, as I said be- "fore, two per cent. difference. In case of our making "four per cent., it would be six per cent." He also testified that he made his investment and paid four thousand pounds for stock in the company in reliance upon the statement that the company might use steam power. It seems that this statement was untrue in point of fact. The company had not received the grant, and were not able to obtain the grant to use steam power, and the speculation proved a failure. The rule of damages was discussed and opinions given on the appeal by Lords COTTON and LOPES, the Lord Justice of the Court of Appeals, as well as by Sir JAMES HANNEN. Lord COTTON said, after a review of the cases, that the intrinsic and not the market value of the property at the time of the fraudulent sale is to be taken in measuring damages, and that the damage was the price paid less the actual value of the thing bought.

Lord LOPES expressed himself as follows: "The question in this case is: What is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true meas-

ure of his damage? In my opinion it is the difference between the £4,000 he paid and the real value of the shares after they were allotted."

In the latest edition of Sedgwick on Damages the rule of Smith vs. Bolles is commented on as follows:

"The *ratio dicendi* of this case would seem to be "that the action is brought not upon the contract of "warranty, but for a tort. Compensation is asked for "loss caused by the defendant's *false statements;* and "to determine its amount the question should be, What "greater amount of property would the plaintiff have if "the defendant's statements had not been made? The "plaintiff's loss is not the value of his bargain; for it "is necessary to the very maintenance of the action to "show that the bargain would not have been made if "the defendant had not made the false statements "complained of. If these had not been made, there-"fore, the plaintiff would have the consideration he "paid, but nothing more" (Note. This is incorrect, for the plaintiff may have expended more than the consideration as the direct result of the fraud), "and "the difference between that consideration" (plus such incidental or additional expenditures, if any) "and the actual value of the property represents all "the loss that was caused by the defendant's tort."

Sedgwick on Dam., 8th Ed., Sec. 778, p. 498.

The case of Smith v. Bolles attracted immediate attention, and it has not been questioned, limited or overruled, but has been followed repeatedly in the Feberal Courts.

In the Eighth Circuit Judge SHIRAS applied the rule in the case of an action brought to recover damages alleged to have been caused the plaintiff by certain misrepresentations touching the character and value of 1,600 acres of pine lands conveyed by the defendant to plaintiff.

Atwater vs. Whiteman, 41 Fed. Rep., 427.

It was also followed in the case of Glaspell vs. Northern Pacific Railway Co., 43 Fed. Rep., 900. This was an action to recover damages for deceit in the sale of land. The misrepresentations were made by the agents of the railroad company, were false and fraudulent, and it was proved that the lands were not as represented. The bill of exceptions states that the Court charged the jury as to the measure of damages that "if they found for the plaintiff it must be in a "sum equal to the difference between the actual value "of the land and the value of the lands as they "would have been if they had been as repre-"sented at the time of the sale." In commenting upon this Judge THOMAS says: "Did "the Court give to the jury the correct rule for "the measurement of damages as applicable to the "facts of this case? The action is for the recovery of "damages resulting to plaintiff from alleged false and "fraudulent representations. The lands were wild "and uncultivated, and at the time of the sale there were "only a few settlers, if any, in the vicinity where this "land was situated. In an action to recover damages "which the plaintiff had suffered by reason of the pur-"chase of stock in a corporation, which he was in-"duced to purchase on the faith of false and fraudu-"lent representations made to him by the defendant, "the Supreme Court of the United States, in Smith vs. "Bolles, 132 U. S., 125; 10 Sup. Ct. Rep., 39, held "that the measure of damages is the loss which the "plaintiff sustained by reason of such representations "such as the amount which he paid out in interest, "and all outlays legitimately attributable to the de-"feudant's fraudulent conduct, but it does not include "the expected fruits of an unrealized speculation. The "rule thus enunciated by the Supreme Court is bind-"ing on this Court if applicable to the facts of this "case. Counsel for the plaintiff contends that the "rule laid down in Smith vs. Bolles, *supra*, applies "only to the purchase of land induced by fraud, and

" refers to Horne vs. Walton (117 Ill., 130, 141; 7 N.
" E. Rep., 100, 103), which is one of the cases cited by
" Chief Justice FULLER in Smith vs. Bolles on page
" 130 of the opinion. In that case the Supreme
" Court of Illinois states that 'where the sale of land
" ' is made by false and fraudulent representations as
" ' to its value, quality or condition, the measure of
" ' damages in any action by the purchaser is the differ-
" ' ence between the actual value of the land and its
" ' value as represented to be at the time of the sale.'
" But that question was not involved in the case, and
" it was unnecessary to give the rule of damages on
" the sale of land induced by fraud. It appears in
" that case that the party procured a loan of $2,000
" through fraud and deceit, upon representation that
" the security was good, the security being land, when,
" as a matter of fact, it was worthless. The Court
" held that the actual loss to the party was the amount
" he had borrowed, with interest thereon, while he was
" kept out of the possession of it. The Court say, on
" page 135 of the opinion: 'We think the true
" ' measure of damages in this case was the amount of
" ' such loss; to wit, $2,000 and interest.' In the
" opinion in Smith vs. Bolles is cited also the case of
" Crater vs. Binninger, 33 N. J. Law, 513, and it will
" be found in that case that the New Jersey Court laid
" down an entirely different rule as to the measure of
" damages on the sale of lands induced by fraud.
" Courts have sometimes made a distinction as to the
" rule of damages in the sale of personal property and
" real property when effected or induced by fraud and
" false representations, but the Supreme Court of the
" United States, in Smith vs. Bolles, seem to have laid
" down a rule applicable to the measure of damages in
" the sale of both classes of property coming within
" the line of facts applicable to that case. Judge
" SHIRAS has applied this rule in the case of the sale of
" line lands, induced by false and fraudulent rep-
" resentations (Atwater vs. Whiteman, 41 Fed. Rep.,

"427). The statute of this State (Section 1967), which "was in force also in the Territory of Dakota at the "time of the trial of this action, and for a long time "prior thereto, is declaratory of the common law rule "as to the measure of damages as announciated, "explained and applied in Smith vs. Bolles. It reads "as follows:

"'For a breach of an obligation not arising from "'contract, the measure of damages, except where "'otherwise expressly provided by this Code, is the "'amount which will compensate for all the detriment "'proximately caused thereby, whether it could have "'been anticipated or not.'

"The latter part of the section 'whether it could "'have been anticipated or not' is new, but as there "is no question of remote damages in this case it is "not necessary to attempt to define the meaning of "these words. The balance of the section, as I have "stated, is declaratory of the common law (Fairbanks "vs. Williams, 58 Cal., 241, 242; 2 Greenl. Ev., Sec. "256; Walrath vs. Redfield, 11 Barb., 368-371). Upon "this statute and the cases of Smith vs. Bolles and "Atwater vs. Whiteman, *supra*, I am of the opinion "that the Court, upon the trial of this action, should "have instructed the jury that if they found for the "plaintiff upon the other issues that as to the measure "of damages they should find the cash value of the "land in the condition it actually was at the time of "the sale, and deduct such value from the sum of "money invested by the plaintiff in the land, and that "difference, with interest added, in the discretion of the "jury, would be the proper amount which the plaint-"iff was entitled to recover. It follows that the in-"struction given by the Court as to the measure of "damages was erroneous, for which error a new trial "must be granted, unless it appears that the error was "harmless, and worked no injury to the defendant."

It will be observed that the statute of North Dakota, which was referred to, is only deemed to be declaratory of the common law.

It was also followed in the Normannia, 62 Federal R., 469 (1894) District Court, S. D. New York, BROWN District Judge:

The above libel was filed against the steamship "Normannia" *in rem*, and against the Hamburg-American Packet Company, her owner, *in personam*. The libel alleges *false representations* made to the libellant by the company's agents in London, just prior to his embarkation on the "Normannia" on August 27, 1892, and at the time of the outbreak of cholera at Hamburg; that the libellant, who had previously bought a first-class cabin ticket for passage by the "Normannia" from Southampton to New York, but who desired to surrender it in case she carried steerage passengers, through fear of contagion and quarantine, was induced to take passage on the "Normannia" at Southampton, on August 27th, on the agent's assurance that no steerage passengers were on board; whereas, in fact she had 500 steerage passengers, who had embarked at Hamburg on the 25th; that in consequence of the presence of the steerage passengers, and of the outbreak of cholera among them, the libellant was detained at quarantine 13 days, and subjected to much suffering, sickness and subsequent loss of time, for which suitable damages are claimed." * * *

(P. 481). *To recover damages for a tort they must be proximately and naturally connected with and flow from it;* they must be such as might be within the contemplation of the parties as a *natural consequence* of the wrongful act, as distinguished from a merely accidental result (Smith vs. Bolles, 132 U. S.) * * *

"Excluding, therefore, such elements of damage as are not properly attributable to the presence of steerage passengers, I think $500 will be a proper compensation for the libellant's loss of time, and for his suffering, so far as legally recognizable. From this sum is to be *further deducted the price of a return* ticket, say $100, which would have been lost if the libellant had not returned upon the "Normania," since

he evidently would have had no legal claim upon the company for its return. There remains $400, for which a decree may be entered in favor of the libellant, with costs."

It was also followed in Wilson vs. New United States Cattle-Ranch Co., 73 Federal R., 994 (1896, Circuit Court of Appeals, Eighth Circuit). The N. Co. entered into a written contract with W. for the purchaes of a cattle ranch and 6,000 head of cattle for about $300,000 and some stock in the corporation, such contract containing various covenants and warranties as to the number and description of the cattle and other matters, and mortgages being given on the land and cattle to secure the purchase money. W. afterwards entered on the ranch, took possession of the cattle and sold them under the chattel mortgage.

Thereupon the N. Co. brought an action against W., alleging that W., by *fradulent misrepresentations*, induced it to make the contract and pay the portion of the purchase price which it had paid.

Sanborn, J. (p. 997): "When a vendee ascertains that he has been induced to make a contract of purchase by the fradulent misrepresentations of his vendor, he has a choice of remedies. * * * Upon an action for damages for the deceit and fraud which induced the purchase, *the measure of damages is what the vendee has lost. It is the difference between that which he had before and that which he had after the contract of purchase was made* (Smith vs. Bolles, 132 U. S., 125, 10 Sup. Ct 39; Reynolds vs. Franklin, 44 Minn., 30.)"

It was also followed in Rockefeller vs. Merritt, 76 Fed. Rep., 909 (1896), Circuit Court of Appeals, Eighth Circuit, SANBORN, J. (at p. 914): "Upon this record the plaintiff was induced by the *false representations* of the defendant to take stock in the new corporation to the amount of $2,967,632, and to part with stocks in his original corporations which, at the rates specified in his contract, were worth 50 per cent. of the amount

of this new stock, or $1,483,816. The stock he received in the Consolidated Mines was actually worth but 10 per cent. of its par value, or $296,763.20. The defendant offered and was refused permission to prove that the actual value of the stocks which the plaintiff gave for his stock in the Consolidated Mines was no greater than the value of the stock he received; namely, $296,763.20. For the purpose of this discussion the statement contained in this offer must now be deemed to be the fact (Scotland Co. vs. Hill, 112 U. S., 183-186). Under this state of facts the effect of the rulings of the Court below upon the question of damages was that, if the jury found the deceit to be proved, as they did, the plaintiff was entitled to recover the difference between the value of his original stocks at the rates specified in the contract, $1,483,816, and the actual value of the stock of the Consolidated Mines which he received, $296,763.20, or $1,186,042.80, notwithstanding the fact that the actual market value of the plaintiff's original stocks was never more than the actual value of the stock in the new corporation which he received for them. Their effect was to permit the plaintiff to recover of the defendant as damages, if the jury saw fit to allow as much, *four times* the actual market value of all the property he had parted with, because, in an agreement for the exchange of stocks, the parties had stated its value for the purposes of the exchange at five times its actual value. Can these rulings be sustained?

The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and is limited to compensation (Smith vs. Bolles, 132 U. S., 125; Busterud vs. Farrington, 36 Minn., 320; Reynolds vs.

Franklin, 44 Minn., 30, 32; Stickney vs. Jordan, 47 Minn., 262; Fixen vs. Blake, 47 Minn., 540, 542; Wallace vs. Hallowell, 56 Minn., 501; Woolenslagle vs. Runals, 76 Mich., 545; McAleer vs. Horsey, 35 Md., 439; Bushman vs. Codd, 52 Md., 202; High vs. Berret (Pa. Sup.), 23 Atl., 1004). These propositions are unquestioned, and counsel for the plaintiff insist that they were properly applied to measure the damages in this case. They maintain that the plaintiff and the defendant agreed by the contract of August 28, 1893, that the actual value of the plaintiff's original stock was an amount of money which was equal to 50 per cent. of the par value of the new stock which he received, or to $1,483,816, and that the defendant is thereby estopped from proving any other value for them in this action. * * * The evidence convinces us that their minds never considered or met upon the question of the actual *market value* of any of these securities, and that they never intended to and never did make any binding agreement upon that subject. The defendant, therefore, did not contract that the market value of the plaintiff's stocks was $1,483,816 in cash, or in anything but the stock of the consolidated mines at 50 per cent. of its par value."

The same rule has been applied in the following cases among others in the several State Courts:

Woolenslagle vs. Runals, 76 Mich., 545.
Greenwood vs. Pierce, 58 Tex., 130.
Matlock vs. Reppy, 47 Ark., 148.
Reynolds vs. Franklin, 44 Minn., 30.
Alden vs. Wright (Minn.), 49 N. W. R., 767.
Craber vs. Benninger, 33 N. J. L., 513.
Hallam vs. Tod Hunter, 24 Iowa, 166.
Hiner vs. Richter, 51 Ills., 299.
Kennedy vs. O'Connor, 35 Ga., 193.
Markel vs. Mundy, 11 Neb., 213.
Howes vs. Axtell, 74 Iowa, 208.

There are, however, other cases in which the Court, in applying these fundamental principles to particular facts, has said that the plaintiff is entitled to recover

the difference between the actual value and the value which the property would have had if it had been as represented.

But we believe that in substantially all such cases the property misrepresented and the character of the misrepresentation was such that it could be said with certainty what such value would have been, and that property of a certain known or agreed value was contemplated by both the person making the misrepresentation and the person relying upon it.

Whether such an application of these principles to such cases be the true rule, where the element of certainly as to the value of the thing represented is present, there can be no doubt that where the thing represented is wholly imaginary and its value speculative and uncertain, it is unsound and without authority in law or basis in reason.

If the views here presented are sound it is submitted that the question certified should be answered. The proper measure of damages to be applied in assessing plaintiffs' damages is the money plaintiffs had paid for the mine and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it.

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EDMUND WETMORE,
Of Counsel.

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Brief of Watmore & Johnson for P.
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Supreme Court U.S.
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Supreme Court of the United States.

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Brief on Behalf of Plaintiff in Error.

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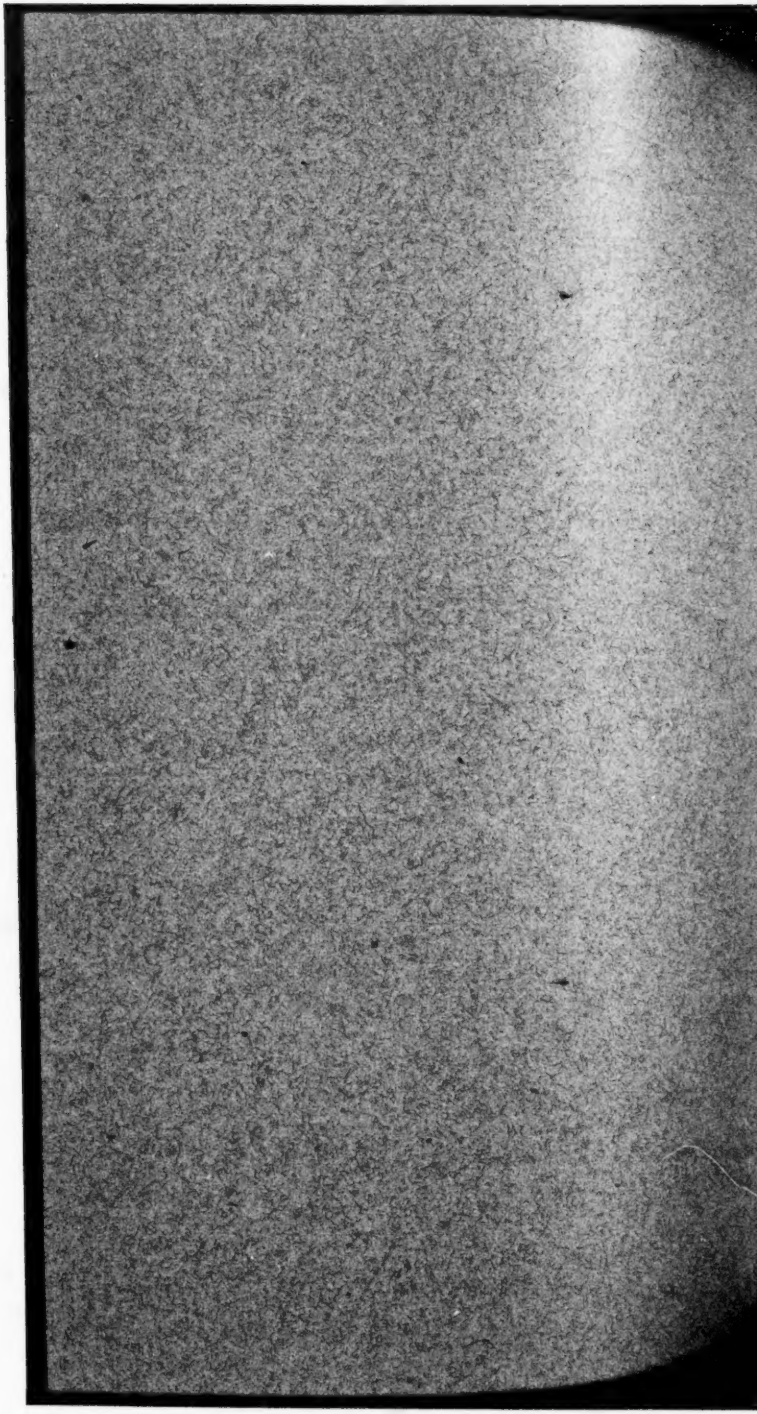
G. S. Sargeant, Printer and Bookbinder, N. Y.



SUPREME COURT OF THE UNITED STATES

JAMES M. SIGAFUS,
Plaintiff in Error,

vs.

DUDLEY PORTER ET AL.

Brief on Behalf of Plaintiff in Error.

This case first came before this Court upon a question of law, as to the proper rule of damages, certified by the Court of Appeals for the Second Circuit.

After argument upon this question, the entire record was directed to be brought up for review, and now comes before this Court pursuant to that direction.

A brief was filed on behalf of the plaintiff in error on the first hearing, which was, and only could be, directed to the question as stated in the certificate of the learned Court below; the present brief discusses that question in the light afforded by the record which is now before the Court and permits a fuller examination of the point involved than was possible from the certificate alone, and, also, as the whole case is now before the Court, discusses certain of the exceptions raised by the writ of error and overruled by the Court of Appeals, should this Court deem it proper to consider the additional questions thus raised.

Statement of the Issues and Evidence in this Case Which Determine the Proper Rule of Damages.

The action out of which the questions in controversy arose was brought by Dudley Porter and others against James M. Sigafus, the plaintiff in error, for fraud and deceit.

The complaint (fols. 12–26) sets forth that, at the times therein mentioned, Sigafus was the beneficial owner of a gold mine in Riverside County, California, the legal title to which was in the Good Hope Consolidated Mining Company, whereof Sigafus was president and owned all the stock with the exception of a few shares belonging to one Bird.

That the said Sigafus, representing his own interests and those of said company and of said Bird, through one William H. Griffith, entered into negotiations with the plaintiffs for the sale of said mining property, and, during the course of said negotiations, made certain false and fraudulent representations, and fraudulently placed among the ores to be reduced in a mill run made to test the value of the ore, quantities of exceptionally rich ore, and covered up excavations in the mine with timber so as to prevent the plaintiff's representative from investigating the condition of said mine, and fraudulently changed certain bullion returns as to past production, and misstated the quantities of ore producing said bullion, so as to show a larger and richer production of gold from ore mined than had, in fact, been made, all of which acts and representations were done with false and fraudulent intent, and that the plaintiff believing the representations and reports and mill run to be correct, bought the said mining property and paid $400,000 therefor, to their damage one million of dollars, the alleged difference between the actual value of the property and what, as is alleged, it would have been worth if the representations and reports and mill run had been true and correct.

All the charges contained in the complaint are denied by the answer (fols. 33–55).

This action, it will be noted, is not brought on a warranty; it is based purely upon fraud and deceit—not upon any statements or representations as to the condition of the mine *at the date of sale*, but upon alleged fraudulent concealments, exaggerated statements as to the past history of the mine, secret enrichments of a small lot of ore taken from the mine to be run through as a test, blocking up abandoned levels and the like, all calculated to deceive a purchaser and induce him to form a higher *opinion* of the value of the mine than he would have formed if he had known the truth, but none of them amounting to a representation of *any* fact, past or present, from which anything more than an *estimate*, and, from the nature of the case, an *uncertain* estimate, could be formed as to the actual value of the property.

This will appear still more clearly from a brief examination of the facts disclosed at the trial and the only evidence on which the charges of fraud were based.

Sigafus, the plaintiff in error, having, as the result of his dealings with the Good Hope Consolidated Gold Mining Company, become the virtual owner of the mine, desired to dispose of it. He originally intended to operate the mine under the agency of his son-in-law, J. Everett Bird, but the latter becoming incapacitated so that he was subsequently placed in an institution, and Mr. Sigafus being an old man, this plan was abandoned and the mine was known to be for sale (fols. 269, 881, 1547).

A number of persons, thereupon, came to examine the mine on behalf of possible purchasers or of those who expected to earn a commission by effecting a sale of the property (fols. 889, 890).

Among others, one Burnham, a mining expert, examined the mine in 1891 on behalf of Doran & Maxwell, who obtained a "bond" or option on the property. As the result of this and a subsequent examination made in February, 1892, Burnham made a report which he furnished Maxwell, and is known as the Maxwell or Burnham report. Burnham was not employed or paid by Sigafus (fols. 889, 890-1).

After a number of negotiations with various parties, including one William H. Griffith, Sigafus finally concluded a contract with said Griffith, by which Griffith agreed, subject to certain terms unnecessary to specify, to purchase the property for $230,000 on or before the 1st of January, 1894 (Exhibit 23, fol. 1581-7).

Griffith sent his own expert to examine the mine—a Mr. Lockhardt—who made his examination early in July, 1893 (fols. 575 and 1310).

In September, 1893, Griffith asked Sigafus if he would send him one of the Maxwell reports and maps, stating that he wanted to compare it with Lockhardt's report, as Lockhardt had made no map and the report was not readily followed out (fols. 892, 893, 1676).

Sigafus secured a copy of said Maxwell or Burnham report from Doran but unaccompanied by any map (fols. 573 and 896), and mailed the same to Griffith (894), and Griffith about the same time sent a copy of the report to James H. Platt, of Denver (fols. 572-4). This could not, on the evidence, have been the copy received from

Sigafus, for the one sent to Platt was accompanied by the map (fols. 219, 282 and 296), and the copy sent by Sigafus had no map (fols. 573 and 896), and Griffith had, at or before the time the report was received from Sigafus, no map himself, for he had lost the last one he had, being one obtained from some other source (fols. 573-4).

Mr. James H. Platt was believed to be a man of wealth, and Griffith wished to interest him in the property (fols. 219 and 362).

Platt sent the report and Griffith's letter accompanying the same to one John S. M. Egan, a mining expert, of Georgetown, Colorado (fols. 281 and 296).

Thereafter at the Oxford Hotel in Denver, in October, 1893, Colonel Platt introduced Egan to Griffith, and told Egan to talk over that California matter with Griffith, and Morse, one of the plaintiffs, joined them (fol. 331). This interview lasted about five minutes (fol. 360).

The testimony as to this interview is as follows :

Morse says : " The property was mentioned to Col. Platt and " myself by Griffith, and we talked the matter over. Col. Platt " said, ' We will send down and make an examination of the prop- " ' erty.' Egan at that time had the Burnham report, and he made " a remark that if the Burnham report could be verified it was a " mine ' made to order,' " and " he did not believe it could be. " That is why we sent him down. His instructions from Col. Platt " and myself were to examine the mine and report to us on it, with " a view to our possible purchase of it " (fol. 358).

" When he left Denver nothing whatever had been said as to " the arrangements for its purchase." " No arrangement or bar- " gain of any kind had been made with Mr. Griffith " (fol. 359).

Griffith says : " Morse said if the report was correct he believed " he could find a purchaser for the mine. It was then agreed be- " tween us that Col. Eagan should go to California and examine " the property, and if it was found to be as set forth in that report " that they would undertake [Col. Platt and Morse] to find a pur- " chaser for it back East " (fol. 554).

Egan says that he was asked by Mr. Platt to thoroughly examine the property and see if the Burnham report would be verified by such examination (fols. 219 and 291).

Egan went down to examine the mine about the middle of November, 1893, four or five days later (fols. 358 and 555).

Griffith met him at Riverside, took him to the mine, introduced him to Sigafus, and told Sigafus that Egan was the expert sent down by Platt and Morse for the purpose of examining the property and that they represented Eastern capitalists, and asked him if he had any objections to Col. Egan making an examination, and he said not, and the property was turned over to Col. Egan for examination. Griffith, who was called for plaintiff, testified: "I remember Mr. Sigafus telling Egan he could examine the property in his own way; do as he pleased with it" (fols. 554, 556).

Egan made his examination, occupying nine days, from November 16 to November 24, 1897, inclusive (fol. 1551, fols. 323, 326 and fols. 804 and 913), and made a typewritten report signed by him (Plaintiff's Exhibit C, fols. 1391, 1415).

During this examination Egan wrote certain letters to Morse and to Roberts, Col. Platt's private secretary, which were admitted in evidence as Plaintiff's Exhibits 13 to 19 (fols. 394-6 and 1546-65).

Passages in these letters throw light upon the capacity in which Egan acted in making his examination. Egan to Morse: "We "must get hold of this property, for it can be made a cool million." "We must plan a campaign at once, and, if I can help East, I, of "course, will do so. The price can stand a good margin of profit "and still be a gift." "If you see the Col. [Platt] talk it over "with him" (fols. 1548-9).

Egan to Roberts: "When you write Col. Platt tell him that we "have found a mine at last" (fol. 1551).

Egan to Morse: "Now, I telegraph you, as the matter must be "pushed through as rapidly as possible." "The price is too low "for the property, and we must get a big slice" (fols. 1553-4).

"Before talking over the purchase of this mine we must have a "consultation." "If any effort on earth can get the Mine we must "get it" (fols. 1555-6).

"Griffith and I start east Saturday night. Arrange time and "place of meeting with Col. Platt" (fol. 1558).

Egan to Platt: "It is the Mine that we have been looking for "for years." "You must write me at once or Griffith, and we "must be united; make every effort to carry it through, and "I think to take it up and carry it through it may be necessary for "me to go east also, and I will make any sacrifice to carry this sale "through." "Don't give the price east until we can meet and con-

" sult." " We must meet somewhere to consult and arrange a plan " of campaign " (fols. 1559-63).

Egan and Morse are shown by their own admissions and evidence to have been neither purchasers nor acting for any purchasers, but anxious to take advantage of Griffith's contract of purchase for the purpose of selling it after, or at the time of its purchase by Griffith, for an inflated value upon the strength of a report as to his examination of the property made by Egan, one of these promoters, who should pose before Eastern capitalists, if any were found, as a disinterested mining expert, but with the expectation of obtaining a large share of the profit of the transaction.

Griffith, Egan and Platt next met at the Astor House, New York, December 1st, 1893 (fol. 383).

Griffith had offered to sell the property, and Morse says: "I did " not know whether he owned it or who owned it at that time" (fol. 384).

Morse says further :

" Egan showed me what has been called the Burnham Report, " and also his own report, in the Astor House " (fol. 385). " There " was then talk of how we could interest some people in it to pur- " chase the mine at that time. Griffith thought Col. Platt was a " millionaire and could handle the whole thing, but he fell down " after a talk and said, ' I am sorry, but I have all I can do in con- " ' nection with these paper mills, and I cannot put in a cent.' " Then we left Col. Platt and came downstairs and talked the mat- " ter over, and I said I had some friends in Haverhill that I " thought I could interest in the property," " and the next day I " went to Haverhill and took the report to John L. Hobson " (fols. 361, 362, 564-5).

While Morse was in Haverhill he showed Egan's report and the so-called Burnham report to Porter & Hobson, talked the matter over with them and told them Egan was in New York. They asked him to go over to New York and bring Egan over (fol. 363).

Morse returned to New York and said he could sell the property, and asked Griffith how much of the profit he would give him and Col. Egan. Griffith said that was a matter depending entirely upon the price realized.

Morse said he could sell it for $400,000, and that he and Egan wanted two-thirds of whatever the profit was. That was orally agreed to between Griffith, Morse and Egan at that time (fols. 565 and 566).

Morse and Egan then left Griffith and went to Haverhill (fol. 566).

There Morse introduced Egan to Porter and Hobson, and Egan showed samples of ore (fols. 363-5).

After this Morse and Egan reported to Griffith that they were making the sale in Haverhill (fol. 566), and a few days later a contract was made between Griffith of the first part and Porter, Hobson and Morse of the second part, whereby Griffith sold the property for $400,000, $150,000 thereof to be paid in cash on or before January 1st, 1894, and the rest to be secured by mortgages (fol. 567 and Exhibit 1, fols. 1474-85).

Morse and Egan and Griffith thereupon went to California to close the purchase, Morse and Egan having first exacted from Griffith a written memorandum as to the arrangement for their profits or commission, providing substantially for the receipt by Morse and Egan, each, of a third of the excess of the price at which, through their efforts, Griffith had contracted to sell their property over the price which Griffith had contracted to pay for it (fols. 377-9 and 580).

To all these negotiations and contracts Sigafus was an entire stranger. On the arrival of Morse, Egan and Griffith, he was, for the first time, informed by Griffith of the sale to Messrs. Porter, Hobson and Morse (fols. 567-8, 368).

Sigafus then by proper deeds and assignments conveyed the property to Griffith, receiving $150,000 cash and $82,000 secured by mortgage (the $2,000 having been added to pay the California mortgage tax), thus making up the original price of $230,000, which, by the terms of Griffith's contract with Sigafus, was to have been all cash, but Sigafus consented to receive part in mortgage with $2,000 added to meet the said tax thereby incurred (fol. 578). The mortgage was made by Griffith and was to secure $100,000 in notes, *viz.*: $82,000 held by and belonging to Sigafus (as above) and the remaining $18,000 in three notes of $6,000 each, which Sigafus endorsed over to Griffith (fols. 569-70), and which Griffith caused to be made so as to enable him to give Egan and Morse a part of the amount coming to them (fols. 369-377, and Exhibits 4 to 11, fols. 1508-44). Sigafus did not know what arrangement, if any, existed between Morse, Egan and Griffith (fol. 580).

Griffith, thereupon, conveyed the property to Porter, Hobson and Morse, the consideration mentioned in the deed being $500,000 (Exhibit 8, fols. 1522-5).

After Porter, Hobson and Morse acquired title to the property, and without the knowledge of Sigafus, they, through their attorneys, Morse and Egan, executed a further mortgage to secure the remainder of the purchase price to Griffith, and to enable Griffith to complete the payment to Morse and Egan of their share of the profits. To accomplish this the property was mortgaged for $125,000, in addition to the prior mortgage, the said $125,000 mortgage standing as security for various notes, one being for $108,000 made to one Filius, a friend of Egan and nominated by him to be held in trust for Egan and Morse, on account of the secret agreement, whereby they were to receive a commission of two-thirds of Griffith's profits in fraud of their principals (Exhibit 11, fols. 1533-40, and fol. 1482).

Porter, Hobson and Morse took possession of the property by their agents January 1, 1894, and Egan was left in charge (fol. 233).

The alleged misrepresentation on the part of Sigafus, as to which any testimony was offered, may be classified as follows:

FIRST. False statements contained in the Burnham report, for which Sigafus was alleged to be responsible on the ground that said report was published with his consent and that he told Egan, when the latter came to examine the mine in November, 1893, that the figures it contained giving the bullion product were correct.

SECOND. The alleged fraudulent acts or concealments done or made, or caused to be done or made, by Sigafus in order to mislead Egan at the time of his said examination.

It will be noted that all misrepresentations upon which the plaintiffs relied came to them solely through Egan. They did not rely upon the Burnham report except as endorsed by Egan, and bought the mine upon Egan's representations (fols. 273, 385, 404-5, 507, 528, 534, 506). They had no communications whatever with Sigafus poior to the purchase (fol. 385, and test. of Parke, Hobson and Wood), and Sigafus is not liable for any errors or misrepresentations originating with *Egan himself;* he is only liable for errors or misrepresentations made by Egan in *consequence* of his own misrepresentations to him.

It is only necessary, therefore, to consider the evidence relating to conversations and transactions at the mine during the visit made

by Egan for the purpose of examining the property ; those conversations and transactions being the only ones had between Sigafus and Egan prior to the contract of sale with the plaintiff.

These conversations and transactions are here examined with the primary object of showing that they afford no competent or sufficient evidence of what the mine would have been worth if any erroneous statements had been true, or whether the acts complained of were committed or not.

The evidence will be briefly summarized under two heads, above indicated, *viz.:* (1) misstatements contained in the Burnham report, (2) alleged fraudulent acts or concealments on the part of Sigafus.

(1) The Burnham report :

The paper receiving this title and which Egan brought with him to the mine, was unsigned and undated. The name of Burnham does not appear anywhere in it (fol. 293, and Exhibit A, fol. 1416 *et seq.*). It refers, as to important particulars, to maps and photographs which are not produced (fol. 297), were not brought by Egan to the mine, or referred to by him or Sigafus, and without which it would be impossible to verify or disprove many material statements of the report. It did not purport to speak as of a date later than nearly two years prior to November, 1893, the date of Egan's examination. Egan testifies : "The copy," referring to said report, "has neither date nor signature, but from details and statistics "given I judge that it was made earlier than 1892" (p. 293). Egan says that Sigafus told him that Burnham had made two examinations of the mine and was a capable person (fol. 296), and there is no evidence to show that these statements were untrue. He also says that Sigafus told him that the figures showing the bullion product in the Burnham report were correct (fol. 250), but he does not say that he showed the paper he had to Sigafus, or that it was a correct copy of the Burnham report—(there is affirmative proof, on the contrary, that it differed from Burnham's first and original report, Exhibit A and Exhibit 33), or that Sigafus stated to him that it was a correct copy, or said that all the statements in any copy of the Burnham report were true. And, as Egan and all the plaintiff's witnesses aver and reiterate that Egan went to the mine for the declared purpose of himself verifying said report (fols. 219, 294, 308, 358, 554, &c.), there was no occasion for Sigafus to say that the statements in said report, at least, so far as they could be verified or disproved by inspection of the property, were true—and if he had said so, Egan would not have relied upon such statements (fols. 294,

307–8); and, if he had relied upon them, it would have been a breach of duty on his part (fol. 743–4 *et seq.*), and an omission to do the very thing he went there to do—namely, *not* to rely on the Burnreport, or on what any one might say about it, but to verify or disprove its statements by his own personal investigations.

In examining the testimony it will be well to keep in mind the following definitions:

FISSURE: The rift or fissure of the country rock across its strata. In it the vein and vein filling lies.

SHAFT: An opening or incline from the surface, extending down the fissure into the mine.

DRIFT: A horizontal opening from the shaft or other excavation in the mine.

LEVEL: A horizontal opening from the shaft laterally in the mine for use in entering it in and running out the ore.

Level and drift are often used synonymously.

UPRAISE: An opening from a level or drift upwards.

WINZE: An opening from a level or drift downwards.

VEIN or PAY STREAK: The quartz and rock-carrying gold.

GANGUE: Waste material in the fissure with the vein, frequently between two portions of it.

HORSE: A large rock of waste of gangue occurring in the fissure.

HANGING WALL: The uppermost side of the fissure, when the fissure lies at an angle with the surface.

As the fissure in this mine lies in the ground at an angle of sixty degrees, one of the walls hangs over the other.

FOOT WALL: The lower wall of the fissure.

STULLS and STULLING: Timbers put in the mine between the walls in excavations to hold them apart, or, in the level, to form the timbers of the roof level.

LAGGING: Boards put behind the stulls to hold the loose rock.

Alleged missatements in the Burnham report:

A. That the pay streak had an average width of two feet.

(1) The stafements of the report upon this point are as follows (Complaint, fol. 17):

At the end of the report there is a summary of what precedes and has been stated in detail in the body of the report. This sum-

mary contains the following item: "Width of pay streak, average of two feet" (fol. 1473). The body of the report, to which this summary refers, is as follows: Under the heading, "Width of Pay Ore," it is said: "Attatched to this report are the width in inches of the actual pay streak, taking every ten feet irresponsive" ([*sic*] probably copyist error for "irrespective"), "of condition of vein at that point" (fol. 1440).

Then follow some particulars not material to the present point, and then comes the *table of widths* (fols. 1442-3), showing the result of measurements taken every ten feet along the shaft, the winzes and upper and lower level of the mine. There are 109 measurements in this table, and a total of widths amounting to 2,645 inches, showing an average of about 24 inches, and, as measurements were taken every ten feet, covering about 1,009 feet of the openings.

At the end of the table it is stated, "But the steady width of pay is 18 inches throughout, increasing as they go north gradually" (fol. 1444).

It is elsewhere stated in the report that "the number of feet development by present owners is 2,900 feet, as can be seen by map" (fol. 1429), (left behind him in Colorado, when he visited the mine, and not compared by Egan), "continuous development or ore shoot 900" (fol. 1429)—*i. e.*, 900 feet on each level, making 1,800 feet, while the shafts and winzes made up the rest of the 2,900 feet, total amount opened up. The table of measurements only includes 85 measurements in the levels—580 feet on the first level and 270 on the second, or less than half of the levels opened through the vein, and only 240 feet of the winzes (fols. 1442-3).

These statements taken together do not amount to an affirmation that the pay streak throughout had an average width of two feet, but only that that was the average width of the vein included in the table of measurements.

(2) In this, as in other matters, the Burnham report speaks as of a date, at least, twenty-two months prior to the time of Egan's examination.

(3) Egan did not *rely* or accept Burnham's statements of the average width of the pay streak; he made his own measurements, and relied on those measurements in making his report.

He states in his report: "Before stating estimates, I would premise that I made estimates every ten feet, and against the mine" (1403).

Speaking of his examination of the mine, he says that, after taking the measurements of the distances between the mill holes and manways: "I started at the first stope near the shaft, measured its height and length between mill holes, and, at every ten feet or so, measured the width of the ore body, and taking samples when I thought it judicious to do so. This was on the first level north. I went through the same method of examination on the first level south. I started at the shaft, and measured from mill hole to mill hole, and measured the height of the stopes above the level, and measured the ore body, about every ten feet, where practicable, and took samples on both levels. In fact, I went through the same operation on all of them" (fols. 229-30).

In his report, he does not state what is the average width of the pay streak, derived from his own measurements. He says the smallest measurement taken was six inches, and the largest 62 inches. Taking the average width of the ore, or pay streak, of the four levels, based on his calculotion of ore in reserve, and it amounts to over 25 inches (fols. 1405-6).

As a result of the whole evidence on this point, it is indisputable that:

1. The statement in the Burnham report clearly means that the exposed parts of the vein, covered by the table of measurements, showed an average of two feet pay streak, which was true, and that the steady width of pay was "18 inches throughout," which was true at the time of Burnham's report, and remained true after the purchase by plaintiff (fols. 278, 1212, 1285).

2. That whatever may have been the statement in Burnham's report in respect to width of pay streak, it was absolutely *not* relied on in making the sale, which was made solely on Egan's measurements, and neither Egan nor the plaintiff was deceived or misled by any statement in Burnham's report as to width of pay streak.

Such statement, therefore, should be eliminated in considering the question of damages and any instruction to the jury or hypothesis submitted to an expert, whereby the jury were instructed and allowed to consider in estimating damages, the difference in value in the mine, between what it would have been worth if its pay streak had had an average width of two feet as compared with an actual average width of eighteen inches, was grave error.

1219

It is charged that the Burnham report states that 2,434 tons of ore from said mine had yielded an average of $23.78 per ton, and that the ore taken from the mine for two years or more had averaged $23.78 per ton (Complaint, fol. 17).

The statements of the report in this respect are directly contradictory, showing manifest mistake or inaccuracy, but while this might confuse, it could not deceive any person reading through the report.

At folios 1435–37 is a table purporting to be the returns of gold bullion from U. S. Assay office to the Good Hope Consolidated Mines, covering the period from March 14, 1890, to February 1, 1892—the last date in the report, which foot up less than $52,000.

At folio 1449 occurs this : "The production of $57,879.78 during "the past year" (*i. e.* the year ending Feb. 1, 1892). This manifestly refers to the past two years, not one year. The report at folio 140 makes this explicit statement :

"The exact tonnage of the mine, month by one month, *does not* "*appear* (italics ours), but in statements forwarded by the superin- "tendent to the owners every other day, beginning July 14th, there "appears a number of car loads of ore hoisted, which is 1774. "These cars hold $12\frac{3}{0\,0}$ cubic feet, weighing from 1200 to 1500 "pounds per car," which makes 1197 tons of 2,000 lbs. each. * * * "The tonnage was obtained by carefully measuring the openings, "and what ore was taken from the stopes" (fol. 1460). After the earliest "July 14th" mentioned in the table, that is, July 14th, 1891, there appears in that tab e less than $22,000 of returns, which would make an average of $17.97 instead of $23.78 for the 1197 tons mined during that period.

The table of assays in connection with which the statement is made as to the entire mill run, although it is said to leave out special assays of rich samples nevertheless retains a number of samples of most exceptionally rich ores, *e. g.*, ores averaging over $100 and $200 per ton. Leave those out, *e. g.*, leave out the few samples of $100 per ton and upwards, four out of seventy-eight samples, and the average of the table is $18.17 ton.

Comparing the statement in the report, that the total mill run prior to the report showed by assay an average of $23.78 to the ton, repeated in the summary, and that the past *year's* product amounted to $57,879.78, when the preceding table of returns shows that it was a little less than $52,000 for the past *two* years, and it is manifest upon the face of the paper that there was an error in the

copying or in the original statement, and such an error that no person examining the report with ordinary care would fail to observe it. This is made still clearer by another statement in the report. The paper says that the author had been informed that the production of the old workings *(i. e.*, before the ownership of Sigafus began two years prior to the report*)* was $260,000 (fol. 1419). At the end of his summary he gives the estimated *total* bullion produced as $317,879.78—*i. e.*, the $260,000 plus the *total* amount produced since up to the date of the report; *i. e.*, plus the *two* years' production under the ownership of Sigafus. Now, the sum $317,879.78 is made up by adding to the $260,000 00
the alleged production "during the past *year*" noted above, *viz.*: 57,879 78

$317,879 78

clearly showing that "past year" is meant for past *two* years, and the mistake in addition whereby the amount is made fifty-seven thousand odd instead of fifty-one thousand odd, may have arisen from mere error of computation, or in transcribing the figure seven, being readily mistaken for the figure one. However it happened, the report can only be intelligently read by understanding that the $57,879.79 refers to the past *two* years' product—the total product of bullion for that time. That much is perfectly clear.

Taking the whole report together, it was impossible that the calculation $23.78 per ton, as an average based upon the rough and uncertain estimate of the tonnage from the sizes of the excavations from which the ore was taken, could be correct.

Nor did Egan in any manner rely upon such calculation, or upon statements he received upon the subject from anybody. In his report he gives the official bullion returns for the months of July, August, September and October, 1893, preceding his examination, showing monthly averages as follows: July, $17.25 per ton; August and September, $16.69 per ton; October, $16.52 per ton; average for the whole, $16.81; and he takes for his estimates of ore in reserve—*i. e.*, ore in the mine not taken out—$17 per ton, that being his calculation from the said bullon returns and his own tests and observations (fol. 1403–5). The mine was bought on the final estimate of the expert who examined it to verify and compare the report as to the past and its *then existing* condition, and he certified

that he estimated the ore as showing a value of $17 per ton on the average.

In view of this testimony to permit the hypothetical question to be put to an expert as to what the value of a mine would have been if, referring to the date of its purchase, the ore had averaged *$18* a ton free milling gold, which was *not* what it was represented to be, or to be *estimated* to be, and then permit the jury to adopt the rule of the difference between the alleged represented value and the actual value, was, also, grave error. The difference of a dollar a ton on Egan's estimates of ore in reserve alone would amount to $46,922, and on ore in sight, $19,833; in all, $66,755.

The other statements in said paper said to be a copy of the Burnham report alleged to constitute false representations, on which the plaintiffs relied, may be briefly considered.

1. The statement that the last *year's* product of bullion was $57,879.79, and that the total expense of said production was $15,000 (Complt., fol. 17).

It has already been shown that the statement of the product of the bullion manifestly and on the face of the paper, refers to the whole product for the past twenty-two months, or the whole period of nearly two years, and not one year. As to the statement of the expense there was no evidence introduced to show that the statement of expenditures made and of the cost of production based thereon was false.

2. That the estimated total bullion product since its discovery down to about February 1st, 1892, was $317,879.78 (Complt., fol. 18).

This is not a statement of fact, but of tradition. It is made up by including $260,000 as the result of past workings, which the writer of the report says he states merely on information. Egan admits that he did not consider the statement of any importance or attempt to verify it (fol. 314).

3. That, "beyond all doubt," the ore in said mines averaged to carry at least $18 per ton in gold (Complt., fol. 18).

That was nothing but a mere *opinion*. As above shown, it was not accepted or endorsed by Egan, whose estimate was $17, and the sale was not made on the faith of any representation that as matter of *fact* the ore averaged $18 per ton.

Egan's estimate was the *only* one on which the plaintiff could have relied. What may have been the ore in reserve or the ore in sight

in February, 1892, was immaterial, the sole question was what was the ore in reserve or the ore in sight in November, 1893, when Egan made his examination. This Egan found to be of ore in reserve 46,922, valued at $797,674; of ore in sight, 19,133 tons valued at $337,161, and those representations were the only ones made to the plaintiff as to the amount of ore just preceding their purchase.

4. That said mines contained 44,733 tons of gold ore in reserve of the net value of $805,186, and also contained 37,333 tons of gold ore in sight of the net value of $761,094 (Complt., fol. 18).

In the first place, these were two statements of pure *opinion* and *estimate*, and not of fact, and, in the second place, Egan made his own examination and report as to this, and this report, speaking of a time at least twenty-one months after the so-called Burnham report plaintiffs had in their hands when they made their investment.

5. That said property had a very large prospective value in addition thereto (Complt., fol. 18).

This is a mere statement of *opinion*, the correctness of which is corroborated by the opinion of Smith & Goldsworthy, defendant's experts (pp. 393 *et seq.*), and no development of the additional property was ever made to show whether or not it was a mistake.

6. That the gold-bearing vein was a permanent and lasting one (Complt., fol. 18).

In the first place, this also is a statement of *opinion* and not of fact; in the second place, Egan examined the property in order to form his own opinion, which he stated in his report; in the third place, there is no dispute that this is a true fissure vein, and that such veins are, as a rule, permanent and lasting, nor is there any evidence that the end of the vein has ever been reached.

7. That the property under an energetic management should produce from $30,000 to $40,000 per month net, and keep the development even with the output (Complt., fol. 18).

This is too manifestly a mere expression of opinion to require comment. Under the plaintiff's company the mine, as the evidence shows, never had an efficient or energetic management.

II.

Alleged fraudulent acts or concealments done or made, or caused to be done or made, by Sigafus in order to mislead Egan at the time of his examination of the mine.

These are as follows :

FIRST. Method of stoping employed in the mine alleged to be deceptive and fraudulent.

This charge amounts in substance to this: in stoping or excavating the vein, the cutting followed the widest parts, giving, it is alleged, an appearance of a continuous pay streak of more nearly uniform width and richness than if the cutting had been driven straight through, irrespective of any variation in the width or richness of the vein.

It is alleged that the ore was unevenly distributed through the vein, and, in excavating the vein, to use Egan's language, "when the streak was small they followed it till it got big, then leave it standing" (fol. 279). The only consequence of this would be that the excavation would show a wavy line in the hanging wall following the widest parts of the vein.

Assuming this to be so, the form of the excavation was no representation of anything that did not exist, was not calculated to deceive a competent miner, and it is impossible to assume that any different state of affairs than that which actually existed to have been definitely or in any manner indicated by the appearance of the vein after excavation, assuming it to have been excavated in the manner alleged by Doran and as just described.

The assumption, upon which alone the suggestion of any deception arising from this method of excavation rests, is that, if a wavy line excavated through a fissure vein shows a general uniform width of quartz-bearing gold, this is decisive evidence that the vein maintains the same *width* and *richness* as high as it may go vertically in either direction. If this assumption is *not* correct, then the fact that the vein carries gold for a generally uniform width, along the line of its exposure, especially where that line is wavy and irregular, is no warrant how far it may preserve that width above that line or exposure, or below the lower wall of the level, or how far the vein may continue that width, if exposed in either direction horizontally. Now, there *is* no assumption from the width of the exposure what may be the width above or below or beyond in either direction.

The precise contrary is testified to without contradiction. In all mines, and especially in fissure mines, the gold is distributed unequally, leaving rich and poor places in the vein. Doran, the plaintiff's witness, admits this, saying: "My observation has been that there are rich places and poor places in all mines" (fol. 101). Mr Smith, whose thorough competency as a mining expert is manifest from his whole evidence, testifies as follows:

"Q. Is there a formation in the mine which you would term "kidneys?

"A. No, sir; the ore is wavy—not always of the same thick "ness; it widens out in places, pinches in in places, and widens "out again.

"And does it not seem to make much difference where you find "a pinch; if you go down you will find it to widen out, or if you "go up you will find it the same way?

"A. Yes, sir, and not always at equal distances. There is no "rule that you can follow to find it.

"Q. According to your experience as a miner of veins of this "character, suppose it had been without pinched places, and had "an average uniform width, say, of two feet, would that be consid- "ered to give a better promise of richness than to have the variety "and size and pinched places as it is?

"The formation of this mine is the best with the pinched veins "rather than to have it uniform."

Rec., pp. 404, 405.

Now, as long as the gold is not distributed evenly through any vein, as it may constantly vary in richness down to absolute barrenness, the fact that a vein of gold of a generally uniform width is exposed, and especially is exposed at *different heights* from the *foot wall*, only shows that there is certainly a wide or rich deposit of gold *along that line*, but what it may be above or below that line, where it has not been exposed, is merely conjecture. Only one thing is practically certain—it will not remain of *uniform* richness; it may be richer, it may be poorer, but it would be against the rule of nature to have it remain continuously uniform. In this very mine the table of widths of pay streak, at page 481, contained in the so-called Burnham report, varies from seven to thirty-nine inches, and Smith's measurements show that it varied throughout the mine from two inches to eight feet (fol. 1212). The assays reported in the said Burnham report shows the widest divergeness in richness

from $1, $2, $4 and $6 a ton up to $100 and $200 a ton and upward. The exhaustive and careful asseys, by Smith and Goldworthy (pp. 575 *et seq.*), show a very wide variation all the way from $1.10 and lower a ton up to several hundred dollars, and, in one case, upwards of $1,100 a ton. Egan's assays, reported in his letter (Deft.'s Ex. C, fol. 1665), show variations from .27 of an ounce gold (1st Col., at one point on 1st level north) equal to $4 and $5 to the ton up to $39.80, equal to upwards of $100 to the ton. Furthermore, the alleged method of stoping only affected the hanging wall, and, in order to calculate the ore in reserve, Egan must not only have also examined the exposure in the foot wall, but the exposures in the vertical walls of the uprights and winzes, in order to get the sides of his blocks, and thereby must have examined vertical cuts through the vein, which must of necessity have gone through rich and poor streaks, and concerning which there is no pretense that any attempt was made to follow rich streaks, nor would that have been possible, the uprights being straight shafts driven from one level to another. Egan, it will be noted, reported that he measured every ten feet along the backs of the stopes and in the bottom of the second level (fols. 229, 230, 231).

It is clear, therefore, that the fact, even if it existed, that the stoping through the hanging wall along part of the levels followed the widest and richest part of the vein as it was uncovered, the bottom and uprights of the level being driven straight through the vein, could not mislead as to the unexposed portions of the ore contained between the vertical and horizontal exposures. The ore actually visible, rich or poor, spoke for itself. The rich part might or might not hold out—how far it would continue no human being could tell. To say how much more the mine was apparently worth because of the disclosure of the rich places, which were actually there, than it would have appeared to be worth if they had been partly covered, is a simple impossibility. It does not afford the basis even for a conjecture.

Second. Alleged concealment of parts of the mine by stulling and lagging.

This charge, in brief, amounts to this: In opening and maintaining a level wooden uprights or supports are necessary and wooden upper or side walls are made, and these are naturally left where the mine has already been worked, or where it is not worth working and access to the parts covered is not required to take out

the ore. There were some such places on some of the levels in this mine. The assumption is that Egan was entitled to assume, without any examination and with full opportunity for examination, that wherever the boarding was erected it covered pay ore, or pay ore had been taken out of it—no representations having been made to him on the subject.

The testimony on this point is briefly as follows: "Stulling" is the heavy timbers fastened into the walls of a mine (*i. e.*, to hold the walls apart, fol. 741), and "lagging" is the boards put on the stulls to hold the ground on the sides or above (fol. 78). About thirty feet of the first level north had been both stulled and lagged. This had been done in regular course as the level was opened. Cheatham, the superintendent, testified, "if the stulling and lagging had not been there it would have all caved in and shut the level up" (772, 773).

In other levels the same thing occurred—the pay streak being exposed all through all the levels except some 150 or 160 feet in all. It was impossible to drive and maintain the drifts and levels without the stulling and lagging (fol. 888). There is no evidence that there was anything improper or unusual in this method of mining. Such barren streaks, as there were, were visible and were seen by Egan (fol. 777). He reports and testifies that he measured the vein every 10 feet horizontally along the backs of the stopes and throughout the mine, and fortified these measurements by measurements in the raises or perpendicular openings, and, in addition to that, measured the width of the vein along the bottom of the second level (fols. 1403–1409), and says (fol. 240): "The samples that I "took, in my judgment, fairly represented the production of the "mine, as then exposed to my examination. I did not take any "samples from the parts of the mine that had been worked, but was "then concealed." In addition to that, in estimating his ore in reserve (at fols. 1405-6), Egan figures but 517 plus 117, or 634 feet of the 700 feet of the first level north, and but 670 feet of the 700 feet of the second level north, thus allowing *66* feet in one instance and *30* feet in the other for barren ground.

Furthermore, Egan was not warranted in any event in making an estimate of stulled and lagged ground which he did not examine (fols. 740, 1204). Upon this all the experts agree, and it is manifest that it must be so. Parts stulled and lagged must be omitted as exhausted or barren. At all events it is clear that no person exam-

ining a mine, with a free hand, as Egan did, had a right to assume *anything* as to concealed ground without examining it.

Olcott, plaintiff's witness, says: "If the stulling and lagging "prevents my examination of the roof of the level, I do not figure "that in as ore in sight or ore in reserve, because there would be no "stulls there if there was ore. The stulls would not be there until "the ore was extracted. The stulls are never there unless there is "ore removed, ordinarily speaking." "To hold the earth up we "timber the soft ground, which is entirely different from stulling, "and lagging over that. You can always examine the top of the "level by breaking through the timbers."

Q. "But suppose you do not break through and do not examine; "would you, or would you not, figure it in?"

A. "Your hypothesis is not intelligible." I would break through and examine it. "An expert should not figure it in as ore in re-"serve or in sight, without examining it" (fols. 740–742).

The square setting was not necessary in this mine, the walls being sufficiently hard to permit the use of stulls with a head board, but the purpose answered was the same (fol. 772).

Goldsworthy, defendants' expert, says:

Q. "Assuming that the mine was in that condition of develop-"ment in November' 1893, as shown by the model, would there be "any difficulty in any expert going through that first level, if he did "his duty, in ascertaining the barren spots, or in ascertaining the "character of the ground behind where it was stulled and lagged "for 120 feet?"

A. "I cannot conceive any difficulty" (fol. 1268).

It is impossible, from the existence of the stulling and lagging, to support a charge of deceit or misrepresentation, or to afford any ground whatever for the allegation that the mine would have *appeared* ty be worth less if the stulling and lagging had not been there, or *how much* more valuable it would have appeared if such stulling and lagging had not been there.

THIRD. Allegation that the ends of the lower levels, north and south, had been boarded up and that Egan did not know that the excavations had been carried 150 feet beyond the boarded end at the south and run into barren ground, and that at the north end the excavation had been run some eighty feet beyond the board and had also run into barren ground because it was run in a wrong direction and missed the vein.

This charge may be very briefly answered:

(a) There was contradictory testimony as to the south end. The defendant's witnesses testified that there was no difficulty in passing the point alleged to be obstructed, which simply had a rough structure there for purposes of ventilation, and that Egan passed beyond it to the face of the drift (fols. 757, 758, 765-667, 783-786, 787); but passing all controverted points the south end of the mine showed the dividing and probable ending of the vein in that direction or, at least, its running into a "dyke" or refractory ground which would be too expensive to work. The Burnham report, which Egan says he had before him, states on this point: "To the south the vein has been found and still shows good pay "*though the streaks divide*, and probably *the end* of *all pay ore to the* "south is covered by the locations owned by the company" (fol. 1424).

Egan does not say anything in his report in regard to this end of the mine, except he says after his resumé of values: "Besides "this ground there is territory to the south 1,900 feet long with an "undeveloped value" (fol. 1413). The plaintiffs cannot claim that they were deceived as to ground which was reported to them as having an undeveloped, *i. e.*, an unknown, value. Egan claims to have discovered, after taking possession, that, "commencing about "eight feet above the bottom of the second level south, the drift "had been driven south from the south shaft about 150 feet; and "that at the south end of the vein, or what little there was of it, "was split up and deflected about thirty degrees, and was in hard, "tight granite, and so, compared with the rest of the mine, was "barren" (fols. 234, 235).

And says:

"In the south drift it showed the termination of the ore body "disclosed in the workings between the main and south shaft, and "it was also evident that a great deal of expensive prospecting "would have to be done before any ore body could be found. In "fact, it looked as though the vein had split up never to come "together again" (fols. 234, 235).

This, in substance, merly confirms the statement in the Burnham report. Defendant's superintendent says that this extension of the second level was in the vein, a small vein, all the way, and that there had been no stoping there (fol. 787), and, it will be noted, Egan does not deny this. And, then, it appears that the vein

divided and came to an end, and that was the very thing Egan was warned to expect.

(b) As to the north end:

No representation is pretended to have been made by Sigafus in regard to this end, and the only representation that is relied on is testified to by Mr. Egan as follows:

"I asked Cheatham if the pile of *débris* at the end of the drift "in the second level north was up against the breast. He answered "that the drift might have been driven five or six feet further, but "that that portion of the drift had been driven whilst he had been "at work on a neighboring mine" (fol. 230).

Egan states that after he took possession of the mine he found that behind the *débris* the level had been run eighty feet further into "a streak of rotten granite that had evidently run off the "vein," and that this was "simply a case of mistake in judgment in "losing the vein" (fols. 234, 235).

This was immaterial, therefore. It only showed that in order to follow the vein excavation must be commenced back at the starting point where it ran off the vein, and this was in fact done; and at the time of Egan's examination they were putting up a raise to connect with a blind drift or exploring drift driven from the stope above the pile of *débris*, and the Smith & Goldworthy map shows that subsequently the workings followed the pay streak in this direction fifty-five feet further.

Egan says that when he arrived he asked Sigafus for a working map of the mine and Sigafus told him he had no working map, but made a rough sketch showing the main openings of the mine, stating about the lengths they were opened, but he does not say that he gave any length for the lower levels; he only claims that he gave him to understand or said that his sketch gave the full extent of the main openings of the mine (fols. 6, 223, 255, 226).

As Egan was just about to go down and measure the mine for himself, this statement cannot be regarded as a representation as to any particular length of feet in either direction, to which the lower levels had been carried.

But whether the extreme ends had been opened or not, it is impossible to allege a misrepresentation or deceit founded on that fact. Egan saw that there was a pile of *débris* at one end and some boards at the other. He does not say that any one told him to what extent if any the level had been driven beyond in either direction. The superintendent said that the north end might have

been driven five or six feet further, but that he wa absent working in another mine when that portion of th drift had been driven. That was all. Egan, therefore, had n right to assume what lay beyond the visible end of the level. H could not expect anything different from the fact, *viz.:* at the sout end, a division of the vein which he had been warned, by Bur ham's report was there, at the north end, a mere accidental loss the vein, which they were at that time engaged in recoverin There is no possible measure of damage to be found in these fact Suppose no excavation had been made, he would have no right assume that the vein might not take a trend there that would mak it necessary to pursue it at a higher level by drifting as they we then doing. There is no pretense that the vein came to an end that place. How much more would the mine have been apparent worth if the breast of the level had been unbroken, than if it ha appeared that a false lead had been had at that point? All behin the breast would have been conjecture. Any difference in value not susceptible even of the rudest calculation.

FOURTH.—Allegation that Sigafus fraudulently put rich ore int the experimental mill run made by Egan, and that the tallies of th number of carloads run were fraudulently diminished so as to mak it appear that less than the actual amount of ore was run throug the mill.

This charge is most conclusively met and denied in the evidenc for the defendant, but it is unnecessary to discuss any aspect of th question involving a consideration of conflicting evidence. Th material fact is this: Egan had made, under his own supervision, mill run of a certain amount of ore. He called it twenty tons, t arbitrarily counting a certain number of carloads as a ton. Ac ually these cars contained, and it is demonstrable that he kne that they contained, over forty tons, and taking their contents the true amount, the mill run showed an average of $15 to $17 p ton, thereby exactly corresponding with the result of the la official returns preceding the said mill run, *viz.:* the return for Jul August, September and October of 1893, which show an average from $16.52 to $17.25 (fol. 1404). This shows that the mill ru run could not have been tampered with, and there is no evidence allegation that there was any misrepresentation or deceit as to th capacity of the cars. The material facts elicited by the evidence to this charge are as follows:

Egan testified that he had several conversations with Sigafus about the mill run.

"He" (Sigafus) "asked me if I wanted 200 or 300 tons run. I "told him I would like to, but that I would only have time to run "about 20 or 30" (fol. 243).

"I requested him to have his mill men or some one take samples "of the crude ore and tailings every alternate hour." "I directed "the mill-run to be made. I made the arrangements for a mill-run "with Mr. Sigafus and with his foreman Cheatham. The amount "of ore was to be 61 cars, which we decided would be about equiv-"alent to 20 tons" (fols. 243–4).

Egan's report as to this is as follows:

"The test run of 25 tons was conducted as follows: "The ore "was taken from every level of the mines and at various points. It "was mined, hoisted and milled under my supervision, the plates "cleaned up, the amalgum retorted and the retort weighed in my "presence." "I took in this test the quartz alone, and as little "outside the vein filling as possible in order to get a test of the ore body itself as far as possible" (fol. 1407).

It appears that cars ran in the levels to the shaft, and were dumped into another car or skip which ran in the shaft to the surface (fol. 799), and that tallies of these cars were taken and kept by Cheatham under Eagan's instructions, and turned into him (fols. 244, 803).

The cars which ran in the levels held between twelve and thirteen cubic feet. The Burnham report states that these cars held $12\frac{3}{16}$ cubic feet, holding 1,200 to 1,500 pounds (fol. 1460), and Egan says that, if the same cars were used when he was making his examination, the figures are correct (fol. 322). In other words, that he measured the cars when making his examination and knew them to correspond to the said figures, *i. e.*, knew their contents in cubic feet and pounds. This measurement is substantially corroborated by all who testified in regard to it, both plaintiffs' and defendant's witnesses (fols. 624, 668, 700, 1176, 1201, 1300). And it is also uncontradicted that the car or skip which ran in the shaft would hold sixteen cubic feet, or 1,680 to 1,728 pounds (fol. 700).

Egan says that *three* cars were taken by him as a ton (fol. 321), and that he reckoned sixty-two cars as twenty-five tons, because he noticed that the ore was dry and the cars full (fol. 274).

Egan, therefore, *knew at the time* that the sixty-two cars, if they were cars which ran in the levels, contained *forty* tons, and if they

were cars which ran in the shaft, *forty-seven* tons instead of *twenty-five* tons, as he reported, thus showing by his own figures that his mill-run actually produced, under *his own observation*, from $15 to $17 per ton *instead of* $36, as he reports (fol. 1210).

Another fact discloses the impossibility of the mill run having consisted of only twenty-five tons. The plaintiff's witnesses testify that the mill run occupied not over three and one-half days (fols. 192, 244, 333 and 556).

That this is incorrect conclusively appears from Egan's own letters written at the time and admitted in evidence (Exhibits 13, 14 and 15).

His letter of November 18 says: "I have just completed my "*third* day's work here, and in a snowstorm." "*I am having mill runs made*" (fol. 1547).

And his letter of November 19: "This is my *fourth* day at the "mine and it will take until about the 26th to get a good mill run "through under my supervision" (fol. 1551). And his letter of *November 23*: "I am now having twenty tons of ore that I have "picked out from various portions of the mine run through the "little trap they have here and shall get through to-morrow night" (fol. 1552).

And it further appears from his testimony (fol. 326) that he went away on Saturday after the 21st of November, 1893. And that the report was completed on Friday after November 21, 1893 (fols. 323 and 326).

Friday by the calendar was November 24th. The mill run, therefore, occupied from *November 18th* to *24th inclusive—six* or *seven* days.

The evidence is that the Bryan mill, the one used, and the only one at the mine, would crush six to ten tons a day (fols. 1560, 191).

As the number of cars sent up was sixty-two, there must have been from forty to forty-seven tons crushed during the run. The plaintiff alleged that the tally was wrong and that even more than sixty-two skips were run through the mill. Crushing from six to ten tons per day and allowing for the time taken for cleaning up the mill would crush just about forty to forty-seven tons in six or seven days, allowing for not running whole days either the first or last days of the run. It would certainly be impossible to crush the admitted amount of 62 skips, and still less, a greater number than 62 skips in three days and a half, because the capacity of the mill would not admit of it. The length

of time consumed by the mill run, therefore, corroborates the result reached by correctly calculating the cubic contents of the cars.

In view of the preceding, it is wholly unnecessary to consider the question raised at the trial, whether or not some ore that had been before mined and was lying in sacks in the level and was used in the mill run was exceptionally rich ore. Assuming it to have been all that the plaintiffs claim it would have added about five dollars in value to the whole run, *i. e.*, assuming the sacked ore represented, as plaintiff's witnesses claim, ore running twenty dollars to the ton, there were twelve sacks at forty pounds each, which all together would equal about quarter of a ton, or five dollars in value (fols. 130, 131); nor is it worth while to discuss the story, not only improbable but, in essential particulars, impossible, told by Doran, a hostile exemployee, and his wife about the alleged surreptitious putting gold into the mill run by Sigafus, nor the evidence as to more than sixty-two skips having been run to the mill. All these allegations are explicitly and circumstantially denied by defendant and his witnesses, but as the result of the mill run, already discussed, shows conclusively that there was nothing exceptional or unusual in the product of the run, this fact, of itself, disposes of the allegation that there was any fraud or deception about it.

In addition to the foregoing, the mill run was not relied upon by Egan in estimating the value of the ore in the mine and its result afforded no data materially affecting the value of the mine. Egan states that in making his estimates he took, not the result of the mill run, which he untruthfully represented in his report as showing thirty-six dollars a ton, but seventeen dollars a ton, derived from the official returns of the preceding four months (fol. 1403). If he had reported the mill run correctly, showing, as it did, almost exactly seventeen dollars a ton, it would not have altered the value he put upon the mine. And the result of a run of a few tons, twenty or twenty-five in a few days, could not have afforded data, even had it shown a lower or higher average, which would prevail against the recorded results of the run of the mill in the ordinary course of business for four months just preceding.

Even assuming that the run had actually shown the result falsely stated by Egan, it is impossible to say that, in view of the returns, it could afford any evidence sufficiently definite to enter into the measure of damages, or, indeed, any evidence whatever of

what would have been the value of the mine, if it had shown an average of thirty-six dollars a ton, for the twenty or twenty-five tons run through, as compared with its value if it had shown an average of seventeen dollars a ton, or less, practically the same as that of the returns.

The foregoing is the substance of all the alleged misrepresentations made by the plaintiff in error or for which he was held to be responsible, or any deceit practiced by him in the sale, as disclosed by the plaintiff's proof or uncontradicted evidence, setting aside the testimony introduced to refute the plaintiff's charges, where that testimony was contradicted.

In respect to these alleged misrepresentations and acts of deceit the evidence supports the following conclusions:

1. The *only* misrepresentations with which the plaintiff in error can be charged are those made to Egan. He had no negotiations with the plaintiffs. The claim is that he misled Egan and Egan misled the plaintiffs. He is not responsible for any errors or misrepresentations made by Egan which were not induced by him, but originated with Egan himself.

2. The alleged misrepresentations to Egan consisted in:

(a) Misstatements in the Burnham report endorsed by Sigafus.

(b) Direct misstatements by Sigafus.

(c) Fraudulent acts by Sigafus, consisting in:

(1) Acts of concealment.

(2) Surreptitiously increasing the richness of the mill run.

Taking these in the order named:

(a) The Burnham report:

(1) This was an unsigned, undated paper. Assuming that there was evidence that it may have passed through the hands of Sigafus when Griffith asked for a copy of the Burnham report, there is no evidence that Egan showed the paper to Sigafus, or that Sigafus was asked to identify it in any way, or whether the unsigned paper was a correct copy of the report, or whether all its statements were true. He said that the figures giving the bullion product were true; and, even if Egan applied this remark to the paper he had, the statement on an examination of the whole paper would correct itself. Sigafus denied that he made the statement.

(2) Egan did not rely upon the Burnham report, nor did the plaintiffs. He came to examine the mine for the very reason that he

did not rely upon it, and the plaintiffs relied upon Egan's report and examination. There was, therefore, no occasion for Sigafus to endorse the Burnham report. He was not asked to do so, nor, if he had, would his endorsement have been acted on. It is the very gist of an action for deceit by false representations that the representtions should be relied on. If a seller of a house say to a purchaser's agent, "The width of the foundation walls is three feet and they extend four feet into the earth; they were measured by a competent mason, and he so reported, and his report is correct," and the agent answers, "That may be so; but I am a mason "myself, and have been sent to measure personally, on behalf of the "purchaser, so as to see whether your mason was right," and the seller replies, "Very well; there is the house; take your own rule "and tape-line, and your own time and way, and make your own "report," and the purchaser's agent accordingly measures and reports the result of his own investigations; then, whether the first mason's report was true or false, and whether the purchaser, had his single statement been accepted, might not have been liable on a warranty, or even for false representations, if he knew his mason's report was wrong—he certainly could be held on neither ground in the case supposed, because his statement was *not* the statement *relied on* in making the purchase. The facts showing that Egan came to make his own independent investigation, and did not rely upon the Burnham report as to anything determinable by inspection and examination of the property, are established by the concurrent and undisputed evidence of both sides. The language of this Court on this point in *So. Development Co. vs. Silva* (125 U. S., 248, 259) is as follows:

"It is essential that the defendant's representations should have "been acted on by complainant to his injury. Where the pur-"chaser undertakes to make investigations of his own, and the "vendor does nothing to prevent his investigation from being as "full as he chooses to make it, the purchaser cannot afterwards "allege that the vendor made misrepresentations" *(Attwood vs. Small, supra; Jennings vs. Broughton*, 5 De Gex, Macnaghten and Gordon, 126; *Tuck vs. Downing, supra).*

(3) The Burnham report spoke of a period nearly two years, certainly over 20 months, prior to Egan's examination, and did not purport to give the condition of the mine at the last-named date, before which important changes may have occurred. *E. g.*, the intermediate development might have altered the aver-

age of the pay streak, as more of it was uncovered; later returns might show a higher or lower average of ore to the ton, and the like. As matter of fact, Egan took the average ore to the ton from the official returns for the past four months preceding his examination. The extent to which the vein was opened might and did vary, and Egan took his own measurements.

Consequently, as to all these particulars, the statements of the Burnham report were not statements of the then condition of the mine, and were not relied on as such.

If they showed a higher average of ore than the mine was then producing, as shown by the latest official returns, or a larger body of ore than was then visible, as shown by Egan's own measurements, they were statements that did not *enhance* but *detract* from the apparent value of the mine, for they tended to show that it was running out and beginning to show exhaustion.

(4) As to certain errors in the report, such as the manifest error in stating in one place two years' product as one year's product; if the whole report is read, they correct themselves, and under any circumstances afford no definite measure of the value of the mine nearly two years later, and in the face of later reports and examinations.

(5) As to most of the statements claimed to be false representations in the Burnham report, they are necessarily and obviously matter of *opinion* and, therefore, need not be considered. Mere opinion as to fact is not a false representation that it exists.

The conclusion to be drawn from the Burnham report, therefore, is that, *first*, it was not relied on, and its statements as to width of pay streak and amount and average richness of ore were not accepted by Egan, who made his own estimates, and, *second*, it was a *historical* and not a present representation, and, *third*, its statements afforded no ground for assuming that the mine had a greater than its apparent value at the time of Egan's examination, and furnished no data whatever for a definite answer to the question, "what would the mine have been worth some two years later, if "such statements—and such statements only—in the Burnham "report as were shown to be *incorrect at the time they were made*, "and not matter of *opinion* or admitted *hearsay* had been "accurate?"

(b) As to alleged misstatements made directly by Sigafus to

Egan, it is sufficient to quote the following from Egan's own testimony (italics ours):

"I did verify Mr. Sigafus's statements the best of my ability "and with the means at my disposal. That verification was before the "sale to Griffith. Mr. Sigafus *didn't make any statements that were* "*not true*, but he neglected to tell me that the second level north "was driven 80 feet further than apparent, and the second level "south 150 feet further than was apparent, and I don't believe now "the ore from that mine averaged $20 per ton since the working of "the mine, as he stated."

Rec., p. 103.

Sigafus positively denies the allegation that he stated that the ore averaged $20 per ton since the working of the mine (fol. 911), nor, if he did, is there any exact proof as to the actual average per ton since the working of the mine, or that the average was not $20 a ton, or that Sigafus did not believe it to have been $20 a ton. In any event, the statement affords no ground for any definite calculation as to the value of the mine at the time of sale.

There is nothing whatever charged to have been said by Sigafus which affords a basis for a comparison between the value of the mine and its value as represented.

(c) As to alleged fraudulent acts by Sigafus; *viz.:* (1), alleged acts of concealment. *(a)* As to the *south* end of the mine.

There was nothing which prevented Egan from proceeding beyond the winze, as defendant's witness positively testified he actually did, and there was nothing to indicate a different condition of the ground and vein in that direction, from that actually existing, which Egan could see for himself, and which was mentioned in the Burnham report, which he says he examined.

(b) As the *north* end of the mine:

Here there was a pile of drift at the end of the level. No misstatement was made to Egan as to whether the drift was against the breast of the level or whether the excavation was carried further or not, or, if carried further, how far it was carried. Sigafus made no statement on the subject, except his general statements giving about the length of the levels, which were not relied on, or intended to be relied on, by either party, because Egan made his own measurements, and which were substantially true because the true level ended there, the further excavation being a mere mislead off the vein, which was recovered at a point above. There is no evidence that

any statements of Sigafus as to the length or condition of the levels was knowingly false. The only statement made as to the débris at the north end of the lower level was that by Cheatham, the superintendent, for which Sigafus could not be held responsible, even if incorrect, unless made with his knowledge and consent and with knowledge on his part of its falsity. No such thing is proved or attempted to be proved. Moreover Cheatham did not purport to have any knowledge on the subject as he was absent and working in another mine when that part of the Good Hope mine was opened (fol. 230).

The fact, whatever it was, was immaterial and afforded no evidence of value. It was merely a temporary loss of the vein; the fact that the level stopped at the drift afforded no evidence, one way or the other, as to what was in the unexplored ground, and, therefore, afforded no criterion of apparent value, and the working of the new drift above, close to the same place, showed that exploration had been begun in another direction, which was sufficient evidence that the vein might have deflected.

(2) As to alleged tampering with the mill run:

It has been shown—

1. The true amount run through the mill was known to Egan, on his own calculation of the number of car loads to the ton.

2. That he falsified this return in his report.

3. That the actual average of ore to the ton shown by the run closely corresponded to the official returns which Egan adopted as the basis of his calculations, and precluded the idea of any increase in richness by additions of the metal, and had no effect on the average adopted by Egan, and, further,

4. There is absolutely no proof as to *what* increase of value was given to the run by such fraudulent act, even under the supposition (incredible in the light of the evidence) that such fraudulent increase had occurred.

The value of a gold mine depends, first, and before everything else, on the amount of gold it contains. This, so far as it can be estimated, is known in ordinary mining language as ore "in sight" and ore "in reserve," the two expressions meaning the same thing—viz., where three or four sides of a "block" are exposed, the amount of ore contained in the block supposing the ore continues through-

out its extent, and to remain of a uniform average richness (fols. 478, 479, 737, 747).

In this case, the only materiality of the alleged misrepresentations worth considering is their supposed materiality as affecting Egan's estimate of the amount of ore the mine contained. The mine was bought because Egan, a professional expert, gave it as his opinion, after a personal examination, that it contained so much ore of an estimated average richness of $17 a ton. That was essentially the only thing that induced the venture. Beyond that all was mere expectation or hope. An unsigned, undated report of a former examination nearly two years before as to amounts already taken out of the mine, or its condition at that time or earlier, were comparatively unimportant. Whatever inferences might be drawn from them were subject to modification by Egan's examination. That, and that alone, was relied on. Now, as the above summary of the testimony has shown, there were no alleged misrepresentations relied upon by Egan in forming his opinion as to the amount or richness of the ore in sight or the ore in reserve. He took its average richness from latest official returns admitted to be correct; he had the fullest opportunity to make his own measurements as to the length and breadth of the exposures of the boundaries of the vein forming the edges of the "blocks," the area of which formed his basis of calculation as to the amount of gold-bearing ore not exposed and buried in the earth. The alleged method of excavation, consisting in leaving the widest parts exposed on the top of the level, did not affect the exposure of the perpendicular cuts through the vein or its exposure on the bottom of the levels, and could not, as already pointed out, have affected, in any measurable degree, his calculation. But, when all is said, the only effect the supposed misleading appearance could have had, would have been to induce him to have made a *lower* estimate of the amount of gold contained in the unseen parts of the "blocks" or sections of the vein he measured. How much less? No one can say. But, even if they *could* say, the estimate would remain pure *opinion* still, and what Egan's *opinion* might have been is not an exact or definite measure of value. *Whatever* his opinion, the mine might turn out richer or poorer than he supposed. His "blocks," when explored, no matter what he predicted they might contain, might turn out to contain little or nothing, or might have nuggets or pockets of enormous richness.

The phrase "market value" was used as to the mine, but, from the nature of the case, there can, properly speaking, be no market

value for such a piece of property as a gold mine. Each mine stands by itself. There are neither enough sales nor a sufficient uniformity of value to create a standard, such as fixes the value of commodities bought and sold in the market.

Plaintiff's cousel was allowed, under defendant's objection and exception, to propose a hypothetical question to expert witnesses, based upon the plaintiff's claim as to the misrepresentations proved, supposing the plaintiff's evidence to be believed. That these questions were based largely upon false assumptions, and were unwarranted by the testimony, and beyond the limit of any allowable hypothesis, is the subject of discussion elsewhere in this brief, but beyond all this, no possible hypothesis, based on the testimony, could alter the nature of the evidence itself, or avoid the fact that in this case, the answer to the question: What would be the value of the mine, if the supposed misrepresentations were true? in its final analysis, can only be the barest conjecture. The review that has been made of the testimony, it is submitted, conclusively establishes this fact. It may be illustrated from the testimony of Olcott, the plaintiff's expert. He was asked to assume that the mine had the number of tons in reserve and the number of tons in sight which it was stated to have in the Burnham report, two years before the sale. He was asked to assume that that ore averaged $18 a ton gold, and that the cost of milling averaged so much, and was then asked what, in his opinion, the mine was worth. Deducting the cost of milling, he finds that, on the supposition in question, the ore would average eleven dollars a ton profit; and, multiplying that amount by the supposed number of tons present, he, by mere calculation, finds that the mine would figure up the precise sum of nine hundred and two thousand dollars ($902,000); or, assuming that all the ore would average $23.78 gold per ton, the value, by the same simple method of calculation, was stated to be $1,375,000. Now, assuming that it was true that at the date of the Burnham report the ore was averaging $18 a ton; and assuming thatthe assays prior to that time had shown an average of $23 per ton, whether the ore still buried in the mine, after two years working and which, at the time immediately preceding the sale, was running at an average of about $17 a ton, or a trifle below, would continue to show an average of $18 to $23, was purely conjecture. The assumption that the blocks estimated as ore in reserve and ore in sight two years before were solid blocks of ore, of an average uniform richness, and without barren ground, was also purely conjecture. Consequently,

the value of the mine, on the supposition presented to the witness, was necessarily a matter of conjecture, and of the highest degree of uncertainty. To leave it to a jury, upon such evidence, to find what the mine would have been worth, if it had been as represented, was practically to leave to the jury to find any amount they might arbitrarily fix, running from nothing up to a million of dollars. Such a rule, it is submitted, cannot be justified without a violation of the cardinal principle that damages in an action for deceit are limited to the direct consequences of the injury to the *loss* the plaintiff has suffered, and must be measured by evidence that permits of calculation based upon *reasonable certainty*, and not upon unrestrained and hazardous conjecture.

The language of this Court in Southern Development Co. vs. Silva (125 U. S., 248) is as follows:

"Besides, the quantity of ore 'in sight' in a mine, as that term "is understood among miners, is at best a mere matter of opinion. "It cannot be calculated with mathematical or even with approxi- "mate certainty. The opinions of expert miners, on a question of "this kind, might reasonable differ quite materially.

"In the case of *Tuck vs. Downing*, 76 Illinois, 71, 94, the Court "say: 'No man, however scientific he may be, could certainly state "'how a mine, with the most flattering outcrop or blow-out, will "'finally turn out. It is to be fully tested and worked by men of "'skill and judgment. Mines are not purchased and sold on a "'warranty, but on the prospect. "The sight" determines the "'purchase. If very flattering, a party is willing to pay largely "'for the chance. There is no other sensible or known mode of "'selling this kind of property. It is, in the nature of the thing, "'utterly speculative, and every one knows the business is of the "'most fluctuating and hazardous character. How many mines "'have not sustained the hopes created by their outcrop?' * * *

"125 U. S., 252.

It is submitted, therefore, that, in the trial below, the learned Court was in error, in permitting this evidence to go to the jury, against the defendant's objection; and in refusing the motion to dismiss, based upon the ground of incompetency of the proof offered as to damages, and the judgment should have been reversed, and a new trial ordered by the Circuit Court of Appeals upon the grounds set forth in the 10th, 19th, 20th, 21st, 23d, 26th, and 28th assignments of error (pp. 593 *et seq.*).

SECOND,

At the trial, the defendant's counsel requested the learned Jugde to charge as follows as to the rule of damages :

" If the jury find for the plaintiffs they can only find as damages " the direct pecuniary loss, if any, the plaintiffs suffered by reason of " the false and fraudulent representations and acts of the defendant. " and the value of the mine, if the same had been as represented, " affords no proper element of recovery. The value of the mine " when plaintiffs bought it must be applied in reducing or ex- " tinguishing the plaintiffs' loss " (fol. 1385),

which request was refused, and the jury was charged :

" The measure of damages in actions of this nature is the differ- " ence of the value of the property as it proved to be, and as it " would have been as represented."

to which exception was taken (fol. 1383). It will be observed that the request to charge was in substantially the language of this Court in the case of *Smith vs. Bolles.* The authorities in support of this rule have bean collected and commented upon in the brief already filed herein, when the case first came before this Court. It is not necessary to argue here the questions considered in that brief. However, a very few additional observations may be made. While it is true that there is a conflict of authorities upon the point, the weight of authority, both in England and in this country, supports the rule adopted by this Court in *Smith vs. Bolles*, and that rule is also the most consonant with principle on a close application of the rules of law. Where, in a contract between two parties, there has been a warranty, such as will support an action *ex contractu*, in which case the warranty must be definite and certain, so as to be capable of enforcement as a contract obligation, the measure of damage, in case of a sale, is clearly the difference between the thing sold, if it had been as warranted, and the thing actually received. If a buyer purchases a lot of iron upon a warranty that it is No. 1 iron, and it turns out to be No. 3 iron, and he elects to sue on his warranty, his damage is clearly the difference between No. 3 and No. 1 iron, because it arises *directly* from the breach of the *promise on which he sues.* It is a direct, immediate consequence of the breach, a damage arising from the very gist of his action ; but, if a party chose to sue for deceit, because, by false representations, fraud, covin and deceit, he has been induced to part with value, and has suffered direct pecuniary damage, he can recover that damage ; but to say that

the loss of his bargain, the loss of profits, the probable *gain* which he might have made by the bargain in which he was cheated, is a direct damage flowing from the *deceit*, is not, it is submitted, strictly coreect. If he recovers damages which put him back in the same position he would have occupied if he had never been cheated at all; he has recovered the whole direct consequences of the injury. Although, therefore, in some cases, the distinction between an action purely for deceit and one on contract, for a warranty, has been disregarded, so far as relates to the measure of damages, yet it would seem that the better and more logical opinion is that which, in case of deceit, puts the plaintiff back in his original position, with compensation for all loss actually incurred. And, at all events, in cases like the present, where there is no alleged representation, which could be held to amount to a warranty, and where the only inducements to the sale, based upon any misrepresentations of the defendant, or representations for which he could be held liable, were inducements which could only affect, not the intrinsic actual value, but merely the conjectural value of the property, certainly the rule as laid down in *Smith vs. Bolles* should prevail.

As the entire record is ordered up before the Court we beg leave to call attention to the following additional errors of the Trial Court to which exceptions were duly taken.

Specification of Errors.

FIRST.

That the Court erred in overruling each and every of the objections of the defendant, duly and seasonably taken, and allowing the following questions, and each of them, to be put to witnesses, examined on behalf of plaintiffs to be answered as follows:

1. By plaintiffs' witness Kingsbury:

"Q. At the time of said mill run did said Cheatham make any "inquiries of you concerning certain sacked ore in the mine? If "yea, state fully what he said in making said inquiries and what "you said? A. He did ask me in regard to some ore in sacks that "was in the stope in the first level near the second mainway north "of the main shaft. Cheatham asked me if it was good ore, and I "told him it was."

2. By plaintiffs' witness Kingsbury:

"Q. Do you know whether Cheatham saw the said con-
"centrates or sulphurets concerning which you have been testifying
"to? If yea, when did he see them, who was present when he saw
"them, and what, if anything, did you hear him say about it? A.
"Before there was any mill run made, a month or two, Cheatham
"asked me one day in the stope, at the same time pointing it out to
"me, if I had noticed it, and I told him I had; the remark was
"made by one of us, 'It looks as if it had been put there.' There
"was no one else present besides him and me."

3. By plaintiffs' witness Miller:

"Q. If said Cheatham gave you any instructions or orders, state
"fully what he said. A. He told me to put some ore that was
"sacked in the chute."

4. By plaintiffs' witness Cocking:

"Q. Did Cheatham give you any instructions as to what you
"should do during the mill run? If so, state what he said in giv-
"ing said instructions and what you said at the same time. A.
"When I went down in the morning he told me not to send up any-
"thing until he came down; when he came down he took me
"around and showed me what chute he wanted me to run out of;
"he told me to run out of all the chutes except one when Egan was
"down in the mine, and I done it."

5. By plaintiffs' witness Cocking:

"Q. If, at any time during said mill run, Cheatham had any talk
"with you about said account (meaning an account the witness had
"kept of carloads of ore run up), state fully what he said and what
"you said and all about it? A. Yes, sir; he did. He came down
"in the mine and wanted to know what in hell I was doing. I told
"him I was not doing anything but sending up ore and running the
"cars. He said I was sending up one car and marking down two;
"I told him I wasn't; then we had a little quarrel over it down
"there."

"Q. If Cheatham at any time did anything to your account that
"you kept on the tally-board of the carloads that were sent up,
"state fully what he did? A. Yes, sir; he did; he scratched off
"fifteen marks from my tally-board."

6. By plaintiffs' witness Cocking:

"Q. If said Cheatham, before Egan came to the mine and

"before the mill run was made, said anything about a purchaser "coming to examine the mine, state fully what he said, how long "before the said mill run that he said it, and where you and he "were when he said it? A. Yes, sir; he told us there was a party "coming here to see about buying the mine; that was one day at "noon, when we were coming up the shaft, about half-way up; it "was a few days before Egan came."

"Q. At the time referred to, if he gave you any order or instruc- "tions as to the workings in the stopes or preparing the stopes for "examination, state fully what he said? A. Yes, sir; he told us "this party was coming, and to get our places fixed up nice, and we "done it."

7. By plaintiffs' witness Whitten:

"Q. Did you have any conversation with Cheatham during the "mill run about your account (meaning the tally of cars) and the "number of cars of ore that came up? If so, state it. A. He said "my tally was not right, that it didn't tally with the boys below."

"Q. If, during the mill run, Cheatham changed any of your "tally-boards, state what change he made? A. There was a change "made by Mr. Cheatham; he said I had too many cars; I don't "remember how many he took off."

8. By plaintiffs' witness Whitten:

"Q. What instructions, if any, did Cheatham give "you during the mill run as to what you should do? "State fully what he said and what you said. A. Yes, "sir; he told me to keep the skip cleaned out. Mr. "Sigafus told me, when Cheatham was present, to keep "the ore cleaned up on the platform where it had spilled off "the car."

These objections and exceptions were taken at folios 129, 135, 153, 157-58, 163, 164-65, 178-79-80.

The evidence was objected to because there was no evidence, direct or circumstantial, that Cheatham was the agent of defendant to make representations, or do the acts testified to, or that defendant knew of or knowingly took advantage of such representation, or acts.

SECOND.

That the Court erred in overruling the objection of the defendant, duly and seasonably taken, and allowed the following question put to James A. Kingsbury, a witness for plaintiff, to be answered:

"Q. Did you hear Cheatham say anything to any other person, "or give any orders to any other person, about said ore that you had "sorted? If yea, state what he said to the person about it, and "who that person was?

"A. I heard Cheatham tell Bev Boren to sort it as he took it "out into the car, that is, the ore that I broke, and he did "sort it, close to a carload."

This objection was taken at folios 132-33.

The evidence was objected to for the reasons stated in the first assignment of error, and also for the reason that the testimony was immaterial, and because Eagan's report of his examination stated that in his test he took the quartz alone and as little outside the vein filling as possible (fol. 1407).

THIRD.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and allowing the following question, put to James B. Doran, a witness for the plaintiffs, to be answered:

"Q. Are you able to state, with substantial accuracy, the aver- "age richness of the ore in the Good Hope Mine in November, "1893?

"A. Yes, sir. The value was $8 per ton in free gold, and a "small value besides in sulphurets." (He called it $1.50 per ton.)

This objection was taken at folios 80 and 81.

This evidence was objected to as incompetent and calling for an opinion, because the witness Doran had not been qualified to testify as an expert or otherwise, in regard to the richness of the ore in November, 1893.

FOURTH.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and allowing the following question, put to James A. Kingsbury, a witness for plaintiff, to be answered:

"Q. In your opinion, what was the value per ton of said sacked "ore? A. It is pretty hard to put a value on it. In my opinion it would run $20 per ton or more."

This objection was taken at folio 131.

This evidence was objected to as incompetent, because no sufficient evidence was introduced that Kingsbury was competent to testify to the value of this ore.

The fifth, sixth, seventh and eighth assignments of error are abandoned.

NINTH.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and in allowing the question put to John M. S. Egan, a witness for plaintiff, to be answered:

"Q. From the statements to you of Sigafus and Cheatham, to "which you have testified, and from the mill run as made, and from "the appearance of the mine and drifts on the second level, closed "up as you have testified, did you, or did you not, conclude "that the statements of the Burnham report were, or were not, "accurate?

"A. I concluded that in the main details the statements in the "Burnham report were accurate."

This objection was taken at folio 280.

This evidence was objected to as incompetent, immaterial and irrelevant, the grounds being, so far as Cheatham was concerned, substantially as stated under the first assignment of error.

TENTH.

That the Court erred in overruling the objections of said Sigafus, defendant, duly and seasonably taken, and allowing the following questions, and each of them, put to John M. S. Egan, a witness for plaintiff, to be answered.

"Q. Assuming that the ore body of the Good Hope Mine had "an average value of at least $17 per ton, and that the average "width of the vein was 24 inches, that the length of the vein de-"scribed by the workings was 950 feet, that the workings of the "mine consisted of the main shaft 416 feet deep, and the south "shaft 391 feet deep, the south shaft being 250 feet distant from "the main shaft, with the drift in the first level at a depth of 250

" feet from the surface—950 feet long—with the opening of from 4 " to 5 feet wide, 5½ to 6½ feet in height, with the drift in the second " level 350 feet below the surface—950 feet in length, with the " opening of the same size, this drift in the second level running " beneath the first for the entire length, and assuming that there " was nothing at the end of the drift to indicate that the vein " pinched out or disappeared, what, in your opinion, would have " been the fair market value of this property ?

" A. From $700,000 to $1,000,000.

" Q. Assuming the same conditions, with these modifications, " that the average value of the ore was $10 per ton ; that the aver- " age width of the vein was eighteen inches, and that the conditions " on the apparent ends of the drifts on the second level were such " as you subsequently found them and have heretofore stated in this " deposition, what, in your judgment, was the fair market value of " the property ? A. About $50,000."

These objections were taken at folios 277 and 278.

This evidence was objected to as incompetent, irrelevant and immaterial. The grounds of the objection being that there was no evidence making the material representations assumed in the first question chargeable to the defendants, or as to alleged facts included in the first question—to wit, that the average width of the vein was 24 inches, and the length of the vein described by the workings was 950 feet ; that the openings in the mine along the levels were from four to five feet wide, and from five and one-half to six and one-half feet in height ; and that there was nothing whatever at the end of the drift, meaning the drift in the second level, to indicate that the vein pinched out or disappeared, or that the vein did pinch out or disappear ; and also that such evidence is not competent to prove any basis for measure of damages.

The eleventh assignment of error is abandoned.

TWELFTH.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and in receiving in evidence and allowing to be read to the jury Plaintiffs' Exhibit 2, the subscription paper of plaintiffs and associates, dated December 18, 1893, to wit, the contents of the paper and the first four names subscribed: John M. S. Egan, Dudley Porter, John L. Hobson and Charles W. Morse.

This objection was taken at folio 366.

This paper was objected to if it be introduced as evidence of liability to anybody except the individual plaintiffs in the case and as immaterial; the grounds of the objection being, first, that the paper by its terms being upon condition that $175,000 for payment January 1, 1894, be fully subscribed (fol. 1492), and no proof of such subscription having been given within the time limited in the paper or before the date of the purchase by Porter, Hobson and Morse, the paper was immaterial; second, that it was a subscription to Dudley Porter alone, and not to Porter, Hobson and Morse (fol. 1489), and there was no proof that at the time of making the purchase themselves the subscription paper to Porter as trustee was filed, so that in any way they could have represented the subscribers to it; third, that there was no evidence offered to show liability to any one but the individual plaintiffs, none of the subscribers having testified to being deceived, and there being no evidence that the plaintiffs were trustees to make an investment for the associates, or for anything else than to disburse moneys for the associates in payment for property which they, said associates, had themselves decided to purchase.

THIRTEENTH.

That the Court erred in overruling the objection of said Sigafus, defendant, duly and seasonably taken, and in receiving in evidence and allowing to be read to the jury (Plaintiffs' Exhibit 2) the subscription paper of plaintiffs and associates and all the signatures thereon. "Know all men by these presents: That we whose names "are hereto affixed do severally and respectively agree with Dudley "Porter, of Haverhill, in the county of Essex and Commonwealth "of Massachusetts, that we will severally and respectively pay to "the said Porter, on the first day of January, 1894 (or as soon "thereafter as he may require), the sums of money written opposite "our several and respective names, amounting to the sum of one "hundred and seventy-five thousand dollars ($175,000), one hun-"dred and fifty thousand dollars ($150,000) of which is to be ap-"plied as the first payment for the purchase of the Good Hope "Consolidated Gold Mining property in California, being the same "described in plan submitted by J. M. S. Egan, and consisting of "two certain mining claims known as the 'Good Hope" and 'San "'Jacinto' and the 'Annex' mining locations, all being located in

" the Pinacate mining district, County of Riverside and State of
" California, together with all the mills, boilers, engines, silver
" plates and mining and milling equipments, car tracks, etc., on or
" appurtenant to or used in connection with the aforesaid property;
" and the remaining twenty-five thousand dollars ($25,000) is to be
" expended in the erection of a twenty stamp mill and such further
" development of the property as may be deemed necessary.
" The purchase price for said property is four hundred thou-
" sand dollars ($400,000), and the balance of two hundred and fifty thousand dollars ($250,000) is to be paid as follows: One hundred thousand dollars ($100,000) on the 1st day of July, 1894, and one hundred and fifty thousand dollars ($150,000) on the first day of January, 1895; said payments of July first, 1894, and January 1st, 1895, to be secured by the obligation of the corporation formed, or to be formed, for the purpose of owning and mining this property, and by a first mortgage upon said property, but twenty-five thousand dollars ($25,000) of said payment of January 1st, 1895, shall be made by William H. Griffith, of Denver, Colorado, and in consideration thereof the said Griffith shall be entitled to one-eighth interest in and to said mining property.

This subscription is made upon the condition that one hundred and seventy-five thousand dollars ($175,000) for the payment of January 1st, 1894, be fully subscribed, and that we do not hereby bind ourselves to pay the whole or any part of said payments of July 1, 1894, and January 1, 1895, excepting that said Griffith shall make said payment of twenty-five thousand dollars ($25,000).

And said Porter does hereby agree with the remaining parties to this agreement that the amount written opposite his name will be applied toward said first payment upon the terms and conditions herein expressed with reference to the other subscriptions.

It is hereby understood and agreed, by and between all the parties hereto, that, in case a corporation be organized for the purpose of mining and owning said property, and the said property is conveyed to said corporation, said Griffith shall be entitled to receive one-eighth interest in and to the capital stock of said corporation in lieu of one-eighth interest in said property as herein provided for.

The subscribers further constitute and appoint Charles W. Morse and John M. S. Eagan, their agents and attorneys, to make said first payment of one hundred and fifty thousand dollars ($150,000), upon evidence satisfactory to them of the title to said property, and upon

terms which they deem proper to secure proper conveyance of said property to or for the benefit of the subscribers, and to form or procure to be formed a corporation to own and mine said property, and to carry into effect the provision that said Griffith shall have one-eighth of said property, or of the stock of said corporation as herein provided, and to do any and all things necessary and proper to vest the title of the remaining seven-eighths of said property, or to the remaining seven-eighths of stock of the corporation formed or to be formed as aforesaid, in the subscribers respectively, in the respective proportions of their several and respective subscriptions.

Witness our hands and common seals this eighteenth day of December, A. D. 1893.

[L. S.]

John M. S. Egan, $10,000, ten thousand dollars.
Charles W. Morse, $15,000, fifteen thousand dollars.
Dudley Porter, $15,000, fifteen thousand dollars.
John E. Hobson, $15,000, fifteen thousand dollars.
Elbridge G. Wood, $15,000, fifteen thousand dollars.
Boyd B. Jones, $10,000, ten thousand dollars.
Charles E. Wiggin, $5,000, five thousand dollars.
D. T. Kennedy, $5,000, five thousand dollars.
Thomas S. Ruddock, $5,000, five thousand dollars.
Austin E. Ruddock, $5,000, five thousand dollars.
George H. Carleton, $5,000, five thousand dollars.
Moody & Bartlett, $5,000, five thousand dollars.
H. L. Doyle, $3,000, three thousand dollars.
J. Otis Wardwell, $3,000, three thousand dollars.
George H. Carleton, $5,000, five thousand dollars.
F. E. Hutchinson, $5,000, five thousand dollars.
John J. Winn, $2,500, twenty-five hundred dollars.
N. B. Newton, five thousand dollars.
Geo. D. Morse, $1,000, one thousand dollars.
Wm. H. Floyd, $5,000, five thousand dollars.
Enoch H. Howes, $2,000, two thousand dollars.
Mellen A. Pingree, $2,000, two thousand dollars.
George C. Howe, $1,000, one thousand dollars.
B. B. Jones, agt., $1,000, one thousand dollars.
Charles H. Poor, $1,000, one thousand dollars.
Kelly Bros., $5,000, five thousand dollars.
E. B. George, $1,000, one thousand dollars.

Geo. W. Gilbert, $2,500, twenty-five hundred dollars.
James F. West, $1,000, one thousand dollars.
Howard H. Gage, $1,000, one thousand dollars.
Maurice D. Clarke, $3,000, three thousand dollars.
Thomas E. Burnham, $1,000, one thousand dollars.
William H. Moody, $1,000, one thousand dollars.
H. L. Dole, $2,000, two thousand dollars.
C. W. Morse, by B. B. Jones, $3,000, three thousand dollars.
" C. Howard Poor by B. B. Jones, $2,000, two thousand dollars."
" Byd. B. Jones, trustee, $1,000, one thousand dollars."
This objection was taken at folios 494-95.

The paper was objected to as incompetent and immaterial, on the ground that the plaintiffs cannot in this action recover in a representative capacity for an alleged deceit practiced upon these other subscribers.

The paper was admitted by the Court, after the statement by plaintiffs' counsel : " As the point is taken that there can be no re-
" covery for the other subscribers, now we offer to prove the fact of
" their subscriptions and the amount of their subscriptions, and then
" we will put in other evidence " (fol. 495). This promise of other evidence as to the deceit of the associates or any fact justifying a recovery on their account, was never fulfilled.

FOURTEENTH.

That the Court erred in overruling the objection of defendant duly and seasonably taken, and receiving in evidence and allowing to be read to the jury the following letter, Plaintiff's Exhibit 15 :

" GOOD HOPE MINE, Nov. 23, 1893.

" C. W. MORSE, ESQ.:

" MY DEAR SIR—I am now having 20 tons of ore that I have out
" from various portions of the mine run through the little trap they
" have, and shall get through to-morrow night. I have measured
" the ore bodies opened up ready for stoping twice, as my first fig-
" ures paralyzed me ; but there is actually in sight nearly a million
" dollars of gold, but ready to mill, $797,000 worth. The gold is
" coarse, and, just as I told you in Denver, the mine seems made to
" order. You would have to be here on the ground to appreciate
" the situation, and, unless you knew *all* the circumstances as I do,
" you would deem it incredible. All the mine needs is a 40-ton mill

"instead of a 6-ton. Even with this, it has paid from the grass "roots, and paid a handsome dividend every month. Now, I tele- "graphed you, as the matter must be pushed through as rapidly as "possible. No stand-off nor talk will go with Sigafus—he wants to "get away from here and get his daughter and childred East. The "son-in-law is in a Keeley institute at Los Gates.

"I hope to hear from you on my return to Denver on the 30th. "The price is too low for the property, and we must get a big slice. "It can be made worth $2,000,000 in two years. I never saw such "a proposition for the money.

"With best regards.

"Yours sincerely,

"JOHN M. S. EGAN."

This objection was taken at folio 395.

This paper, a letter written from Egan to Morse during Egan's examination of the mine—there being no evidence whatever that defendant knew of or authorized it, or that any one but Morse ever saw it, or relied upon it; but the contrary, first offered in evidence after Egan's examination had been completed and he had died—was objected to as not binding upon the defendant, and as immaterial, irrelevant and incompetent.

FIFTEENTH.

The Court erred in overruling the objection of said defendant duly and seasonably taken, and in receiving in evidence and allowing to be read to the jury the following letter of John M. S. Egan to one James H. Platt, dated at Good Hope Mine, November 21, 1893, in substance as follows:

"My opinion in the report is now fully confirmed by my examina- "tion, now in its sixth day. It is the mine that we have been look- "ing for for years. It is a mine that can be worth a cool million, "or two of them, in a year, by vigorous and proper management, "and pay big from the word go. The circumstances narrated by "Mr. Griffith as causing the sale of the property are absolutely "true: An only daughter, a mine purchased for a worthless son-in- "law in a Keeley institute, practically incurable, and the old man's "other big properties in Mexico shut down so he cannot attend to "them, and cannot, or will not, leave the mine to go to the dogs. "The purchase price of the mine is in evidence in one stope alone.

" The gold is free and coarse. The mill is a very rattle-trap, runs " six tons a day, yet clears over a hundred dollars a day. It is a " bonanza, absolutely. There is good reason for his selling. It is " an opportunity that comes but once in a lifetime. We must meet " somewhere to consult and arrange for a plan of campaign, and if " not convenient for you to come to Denver with Mr. Morse, Griffith " and I will go on East and meet you, but the game is worth the " candle, well worth it."

The objection is taken at folio 396.

This paper (Plaintiffs' Ex. 18), printed at folios 1559-63, a letter written by Egan to one James H. Platt, a stranger to both parties, was objected to as not binding on defendant and as immaterial, irrelevant and incompetent. The other circumstances as to it are similar to those detailed in the fourteenth specification of error.

SIXTEENTH.

That the Court erred in overruling objections in each case of defendant, duly and seasonably taken, in receiving in evidence and allowing to be read to the jury, letter from John M. S. Egan to Charles W. Morse, dated Perris, Cala., November 18th, 1893, Plaintiffs' Exhibit No. 13; letter from John M. S. Egan to C. A. Roberts, dated Good Hope Mine, November 19th, 1893, Plaintiffs' Exhibit No. 14; letter from John M. S. Egan to Charles W. Morse, dated Good Hope Mine, Plaintiffs' Exhibit No. 16; two telegrams from John M. S. Egan to Charles W. Morse, dated Denver, Col., November 29th, 1893, Plaintiffs' Exhibit No. 17.

These objections were each and every of them taken at folio No. 395. These papers printed in full at folios Nos. 1546-51 and Nos. 1555-58, and being letters and telegrams written from Egan to Morse and Roberts, a stranger to the transactions, during Egan's examination of the mine, there being no evidence whatever that defendant knew of, or authorized them, or any of them, or that any one but Morse ever saw or relied upon them or any of them, but, on the contrary, and being first offered in evidence after Egan's examination in this case had been completed and he had died, were objected to as not binding upon the defendant and as immaterial, irrelevant and incompetent.

SEVENTEENTH.

That the Court erred in overruling the objections of the defendant, duly and seasonably taken, and in allowing the following questions, put to Elbridge G. Wood, a witness for plaintiffs, to be answered:

"Q. What papers were submitted to the investors so far as you "know?

"A. These two reports.

"Q. And where you did not show the identical papers to the "subscribers, did you make any statement to them, and, if so, what "as to the contents of the papers?

"A. I could not state any definite statement made to them "from my recollection at the present time."

These objections were taken at folios 500 and 502.

This evidence was objected to, first, as not brought home to the defendant and as not binding on defendant, the grounds being that there was no evidence that Wood made any statement with the knowledge of defendant or his authorization, or that he was defendant's agent for any purpose; and, second, that this evidence was incompetent upon the question as to whether or not any of the subscribers relied upon these statements or were deceived.

The eighteenth assignment of error is abandoned.

NINETEENTH.

That the Court erred in overruling the objections in each instance of said Sigafus, defendant, duly and seasonably taken, and in allowing the following questions put to Eben E. Olcott, a witness for plaintiff, to be answered:

"Q. Assuming that the Good Hope Mine was opened up by "two levels, each having a length of 950 feet, level No. 1 being 250 "feet below the surface, and level No. 2 being 100 feet below No. 1, "and on the same vein, each level being in the vein its entire "length, and each level being connected with a main shaft which "had a depth of 416 feet, and was in the vein at the bottom; and "assuming that the ore body in the mine was a continuous one the "entire length of said levels, with an average width of 24 inches, "and with an average value of at least $18 a ton, free-milling gold, "and that there was of said ore 44,733 tons in reserve, above the "second level, and 37,333 in sight below the second level, and that

" the entire cost of mining and milling said ore, including all " charges of whatsoever nature, would not exceed $7 a ton, that in " a twelve months' mill run 2,434 tons of ore had been mined and " milled as mined from said mine, and had produced in bullion " $57,897.78, being an average of $23.78 in free gold per ton, at a " cost of $15,500; and assuming further that the Good Hope " mining claims were 4,000 feet in continuous length, and in other " respects were not developed, and that the main shaft was " in ore at its lowest depth; that the levels were in ore at their " ends and throughout their length, and that there was nothing " seen, visible, that afforded any reason for believing that the ore " body did not continue in length and depth for an indefinite " distance, what, in your opinion, was the fair market value on the " first of January, 1894, of such a mine?

" A. From $902,000 to $1,375,000, based upon the two defferent " sets of values given in the report and in your question.

" Q. If any ore body 24 inches wide contains an ore reserve of " 44,733 tons, how much would an ore body 18 inches wide, but of " the same dimensions in other respects contain?

" A. Three-quarters as much, as eighteen is three-quarters of " twenty-four, and that would be 33,000."

These objections were taken at folios 723-726-7.

This evidence was objected to as as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert on matters not included in any statement of false representations against the defendant; that it assumes as facts pure matters of opinion, and that it assumes facts that have not been proved in some respects, and as to which there is no evidence, the grounds of the objection being that there was no evidence as to any representations chargeable to the defendant, or as to alleged material features included in the assumption, to wit:

Each level being in the vein its entire length; the main shaft was in the vein at the bottom; the ore body in the mine was a continuous one the entire length of said levels; with an average width of 24 inches and with an average value of at least $18 a ton in free-milling gold, that there was of said ore 44,733 tons in reserve above the second level, and 37,333 tons in sight below the second level, and that the entire cost of mining and milling said ore, including all charges of whatsoever nature, would not exceed $7 a ton; that in twelve months' mill run, 2,434 tons of ore had been mined and milled as mined from said mine, and had pro-

duced in bullion $57,897.78, being an average of $23.78 in free gold per ton, at a cost of $15,500; that the Good Hope mining claims were in other respects (than as stated in the question) undeveloped; that the levels were in ore at their ends and throughout their entire length, and that there was nothing seen visible that afforded any reason for believing that the ore body did not continue in length and depth for an indefinite dstance, and also that said assumption called for an estimate upon alleged statements of pure matters of opinion, with which the defendant cannot be charged, to wit:

That the ore body in the mine was a continuous one the entire length of said levels, with an average width of 24 inches and with an average value of at least $18, and contained free-milling gold, and that there was of said ore 44,733 tons in reserve above the second level, and 37,333 tons in sight below the second level, and that the entire cost of mining and milling said ore, including all charges of whatsoever nature, would not exceed $7 a ton, and also that such evidence is incompetent to prove any basis for measure of damages.

TWENTIETH.

That the Court erred in overruling the objections, in each instance, of said defendant, duly and seasonably taken, and in allowing the following questions, put to Eben E. Olcott, a witness for plaintiffs, to be answered:

"Q. Assuming that the Good Hope Mine was opened up by "two levels, each 950 feet in length, level No. 1 being 250 feet below "the surface, and level No. 2 being 100 below level No. 1, each being "in the same ore body and connected with a main shaft 416 feet "deep; and assuming that this ore had an average width of 18 "inches; that it was not a continuous ore body, but pinched in and "out in different places, so that one-fifth of the ground between the "surface and the second level was barren ground; that beyond the "north end of the apparent second level, the level had been drifted "not less than 80 feet in barren ground, the vein lost and noth-"ing to indicate it extended beyond said north end, and "thereupon this opening into the barren ground had been "closed up and concealed from view; and assuming also that beyond "the south end of the apparent second level, that level, for not less "than 150 feet, had been driven in barren ground, the vein lost and "no indication that it extended further than said south end, and that

" this extension of the south end had been closed up and concealed " from view ; and assuming that the ore in reserve in said mine did " not exceed 33,550 tons, without deducting any allowance for said " barren ground ; and assuming further that the ore in sight did not " exceed in quantity 27,999 tons ; and assuming also that the average " value of the ore mined did not exceed $11 a ton ; that the cost of " mining and milling it was not less than $11 per ton, and that there " was no reliable record of what it had done in the past, and that the " mining claims, of which this mine was a part, were 4,000 feet in " continuous length, and were developed only as herein stated ; on " these assumptions what, in your opinion, was the fair market value " of the property, on the same date, January 1, 1894, including " the mine ?

" A. I should say that such a mine was, commercially speaking, " valueless, on the basis that it cost as much to extract the gold as " the total product of the gold in the ore."

These objections were taken at folios 730-31.

This evidence was objected to as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert upon many matters which are not included in any statement of false representations against the defendant, that it assumes as facts pure matters of opinion, and that it assumes facts that have not been proved in some respects, and as to which there is no evidence to prove, the grounds of the objection being that there was no evidence as to alleged facts included in that assumption, as follows :

That beyond the north end of the apparent second level the level had been drifted not less than eighty feet in barren ground, the vein lost, and nothing to indicate its extending beyond the north end ; that beyond the south end of the apparent second level that level for not less than 150 feet had been driven in barren ground, the vein lost, and no indication that it extended further than said south end.

TWENTY-FIRST.

That the Court erred in overruling the motion of said Sigafus, defendant, duly and seasonably made at the close of plaintiffs' case to dismiss the complaint, said motion being as follows :

" MR. WETMORE : If your Honor please, I will state my motion " to dismiss. I move to dismiss the complaint on the ground that

"the cause of action set forth in it has not been proved. The cause "of action set forth in the complaint is, in substance, that the de- "fendants, through one William H. Griffith, entered into negotiations "with the plaintiffs for a sale to them of certain lands and mines, "mining claims and appurtenances, and that prior to the 28th of "December the plaintiffs entered into negotiations for the purchase "of said lands, and the defendant falsely and fraudulently repre- "sented to the plaintiffs the misrepresentations which have been "stated by counsel for the plaintiffs in his opening, and did to the "plaintiffs the fraudulent acts which are complained of.

"I move to dismiss the complaint upon the ground that this "cause of action has not been sustained.

"FIRST. Because there is no proof sufficient to go to the jury "that Mr. Griffith was in any way the agent of the defendant for "the purpose of making the sale, but that it clearly appears that "the relation was that of vendor and vendee.

"SECOND. That the plaintiff's sole contract, which was under "seal, was with Griffith.

"THIRD. That at the time of Colonel Egan's visit to the "mine there was no relation existing or intended between "the plaintiffs Porter and Hobson and the defendant "Sigafus. There is no evidence that at that time the plaintiffs, or either of them, had ever heard of Sigafus or of the Good Hope Mine.

FOURTH. That there is no evidence sufficient to go to the jury that the document which has been called the Burnham report was the one to which Mr. Sigafus referred, and to which Col. Egan referred, both intending the same thing. Any document of that name that has appeared in the case in their relations has not been identified.

FIFTH. That there was no relation between the plaintiff Morse and Col. Egan at the time of Egan's examination of the mine that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan.

SIXTH. That there is no evidence that the plaintiffs in this case as set forth in the complaint, relied in any manner upon the statements which were made by Mr. Sigafus.

And I move to dismiss; first, as against the plaintiffs Porter and Hobson; secondly, as against the plaintiff Morse; and thirdly, for the reasons already stated, against the plaintiffs not named, whom these plaintiffs claim to represent."

This motion wes made by defendant and overruled over the exception of defendant at folios 752-756.

The twenty-second assignment of error is abandoned.

TWENTY-THIRD.

That the Court erred in denying the motion of said Sigafus, defendant, duly and seasonably made, to strike out the testimony of plaintiff's witness Eben E. Olcott. The full substance of this testimony appears above in assignments nineteenth and twentieth, and the following summary:

" The $902,000 and $1,375,000 were based upon two different " sets of values given in the report and in the first by hypothet- " ical question; one, a positive statement, is that the ore is worth " at least $18 per ton, free milling gold, and that the value is taken " in the calculations that are made on the various blocks of ore, " estimated in reserve and in sight, on that basis, $18 a ton and $7 " expenses, and on an amount of 82,000 tons which are estimated, " 44,000 in one case and 37,000 in the other, it leaves a net profit of " $11 per ton, or 11 times 82,000 equals $902,000. That is entirely " outside of the value in the future. The other value, leading up " to $1,375,000, is based on the result of a mill run, giving the value " of the actual product as $23.78 per ton, and the net of that would " be $16.78, and 82,000 times this would be $1,375,000.

" There is no better way of determining the value and quantity " of an ore reserve than by mining and milling it. It can be better " determined by a year's mill run with one's own men than by a " three days' run with employees of seller.

" I arrived at this estimate by multiplying the number of tons of " estimated ore in reserve and estimated ore in sight by the esti- " mated value of free milling gold in each, and subtracting the num- " ber of tons multiplied by the cost of extracting. It would take " about four years to mill 80,000 tons. I do not estimate ore an " inch further down than the lowest level nor an inch further than " the ends of the levels; in making a correct estimate ore below " the bottom of the lower level should be thrown out. I am not talk- " ing about a correct estimate.

"When I say that mines have been sold on the basis of ore in "sight, I mean the correct practice as to ore in sight. Nothing is "figured unless you can get to the four sides of it. If the stulling "and lagging prevents examination of the roofs of the levels I do "not figure that, as there would be no stulls there if there was "ore. In case an expert did not break through the timbers "and examine the roof of the tunnel he should not figure it as ore "in reserve or in sight."

This motion was made by defendant, and overruled over the exception of defendant, at folio 1349, the grounds of the motion being that the testimony affords no criterion to go to the jury, being based upon assumed misrepresentations of facts, as to which representations there was no proof, and upon assumed facts, as to which there was no proof and being based upon an erroneous theory, as to the measure of damages, all of which objections were taken first at the giving of the testimony, and the further ground that upon the witness' own statement, in answer to the hypothetical questions put to him, the data would not permit of an accurate answer.

TWENTY-FOURTH.

That the Court erred in denying the motion of said defendant, duly and seasonably taken at the close of the testimony, to dismiss the complaint, which motion was as follows:

"MR. WETMORE: Also to save my rights I move now, at the "conclusion of the evidence, to dismiss the complaint, upon the "separate grounds already stated, and each and every of them, to wit:

"1. That the cause of action set forth in the complaint has not "been proved in favor of each or either or any of the plaintiffs.

"2. That there is no proof, sufficient to go to the jury, that Mr. "Griffith was in any way the agent of the defendant for the purpose "of making the sale, but that it clearly appears that the relation "was that of vendor and vendee; that the plaintiffs' sole contract, "which was under seal, was with Griffith.

"3. That at the time of Col. Egan's visit to the mine there was "no relation existing or intended between the plaintiffs Porter, "Hobson and Morse and the defendant Sigafus; that there is no "evidence that at that time the plaintiffs, or either of them, had "ever heard of Sigafus or of the Good Hope Mine.

" 4. That there is no evidence, sufficient to go to the jury, that " the document which has been called the 'Burnham report' was " the one to which Mr. Sigafus referred, and to which Col. Egan " referred, both intending the same thing. Any document of that " name that has appeared in the case, in their relations, has not " been identified; that there was no relation between the plaintiff " Morse and Col. Egan at the time of Egan's examination of the " mine that would enable Morse, any more than the other plaintiffs, " to hold the defendant liable for the statements made to Egan.

" 5. That there is no evidence that the plaintiffs in this case, or " each or any of them, as set forth in the complaint, relied in any " manner upon the statements which were made by Mr. Sigafus; " that the motion to dismiss is (1) against the plaintiff Porter & " Hobson, and (2) against the plaintiff Morse, and (3) for the reasons " already stated against the plaintiffs and each of them not named, " whom these plaintiffs claim to represent."

This motion was made by defendant and overruled over the exception of defendant at folios 1350–54.

There was no evidence that Sigafus authorized Egan or Griffith to use the Burnham report for the purpose of influencing prospective purchasers, or that they relied on its except as endorsed by Egan.

TWENTY-SIXTH.

That the Court erred in charging the jury against the objection of said Sigafus, defendant, duly and seasonably taken, as to measure of damages, as follows: "The measure of damages in actions of this nature is the difference of the value of the property as it proved to be and as it would have been, as represented."

TWENTY-SEVENTH.

That the Court erred in refusing to charge the said defendant's eighth request to charge, duly and seasonably made, which was as follows:

" The damages in this case must be limited to those suffered by the plaintiffs in this action, and cannot include damages to other subscribers to the stockholders' agreement, not proved to have invested on the faith of Egan's endorsement of the Burnham report; no damages can be recovered, except for those individual plaintiffs."

TWENTY-EIGHTH.

That the Court erred in refusing to charge the said defendant's ninth request to charge, duly and seasonably made, which request was as follows :

"If the jury find for the plaintiffs they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine when plaintiff's bought it must be applied in reducing or extinguishing the plaintiffs' loss," and charged upon the question of the measure of damages instead, as stated in assignment number twenty-sixth above.

These further assignments and specifications of error naturally group themselves under four heads :

1. Errors in the admission of testimony of experts as to value, based upon improper assumptions.

2. Errors in admitting evidence to charge the defendant with damages to others than the plaintiffs personally.

3. Error in denying the motion to dismiss the complaint on the ground that plaintiffs were not deceived by Singus, but by Egan.

4. Error in admitting evidence as to the acts, statements and declarations of Cheatham.

The Court erred in admitting the testimony of experts as to the value of the property as it was and as it would have been if as represented, based upon assumptions material to the estimate, as to which there was no evidence whatever, and assumptions which assumed as facts what were purely matters of opinion, and based upon incomplete assumptions.

Assignments and specifications of error Nos. 10, 19, 20 and 23 :

These errors occurred in the admission of testimony of two witnesses—to wit, OLCOTT AND EGAN.

The objection to the testimony of Olcott was taken both at the time (fols. 723, 731) and by a motion to strike out his testimony at folio 1430.

The questions objected to at the time were, *first*, a question based upon assumptions of material false representations claimed to have been proved as to what was the alleged market value of the mine on January 1, 1894, if it had been as represented; and the *second*, a question based upon assumptions of material facts claimed to have been proved as to what was the said value of the mine on the same date, as it actually existed.

These questions were objected to as incompetent, immaterial and irrelevant, on the ground that each called for the opinion of an expert upon many matters which were not included in any of the claims of false representations against the defendants; that each was based on assuming as facts pure matters of opinion; and that each assumed certain supposed facts which had not been proved, and as to which there was no evidence (fols. 723–31).

And the motion to strike out the testimony of Olcott (fol. 1349) was on the ground that it afforded no criterion to go to the jury, and that upon his own statement, in answer to the hypothetical question put to him, the data would not admit of an accurate answer.

THE FIRST QUESTION AND ANSWER OBJECTED TO IS AS FOLLOWS:

"Assuming that the Good Hope Mine was opened up by two "levels, each having a length of 950 feet, level No. 1 being 250 feet "below the surface, and level No. 2 being 100 feet below No. 1 and "on the same vein, each level being in the vein its entire length, and "each level being connected with a main shaft, which had a depth "of 416 feet, and was in the vein at the bottom; and, assuming "that the ore body in the mine was a continuous one, the entire "length of said levels, with an average width of 24 inches, and "with an average value of at least $18 a ton free milling gold, and "that there was of said ore 44,733 tons in reserve above the second "level, and 37,333 tons in sight below the second level, and that "the entire cost of mining and milling said ore, including all "charges of whatsoever nature, would not exceed $7 a ton, that in "a twelve months' mill run 2,434 tons of ore had been mined and "milled as mined from said mine, and had produced in bullion $57,- "879.78, being an average of $23.78 in free gold per ton, at a cost "of $15,500; and assuming further that the Good Hope mining "claims were 4,000 feet in continuous length, and in other respects

"were not developed, and that the main shaft was in ore at its "lowest depth, and that the levels were in ore at their ends and "throughout their length, and that there was nothing seen, visible, "that afforded any reason for believing that the ore body did not "continue in length and depth for an indefinite distance, what, in "your opinion, was the fair market value on the 1st of January, "1894, of such a mine?

"A. From $902,000 to $1,375,000, based upon the two different "sets of value given in the report and in your question" (fols. 720-24.)

"Q. And what were those two different sets of values?

"A. One, a positive statement, is that the ore is worth at least "$18 a ton, free milling gold, and that value is taken in "the calculations that are made on the various blocks of "ore estimated in reserve and in sight. On that basis "of $18 a ton, and $7 a ton expenses, and on an amount "of 82,000 tons which are estimated—44,000 in one case and "37,000 in the other—it leaves a net profit per ton of $11. "Eleven times 82,000 is 902,000. That is entirely outside of the "value in the future" (fols. 724–25).

"The other value leading up to 1,375,000 is based on the "result of a mill run, giving the value of the actual product as "$23.78 per ton, and the net of that would be $16.78, and eighty-"two thousand times that would be $1,275,000" (fol. 725).

The improper and objectionable assumptions in these questions are of two kinds: First, of representations as to facts at the time the mine was bought, as to which there is no evidence whatever. Second, of representations which, even if they had been made, would not have been actionable as mere statements of opinion, and which can, therefore, even if false, form no basis for assessing damages.

1. Assumptions of representations as to facts at the time the mine was bought, as to which there is no evidence whatever.

"A. That the ore body in the mine had an average value of at "least $18 a ton free milling gold, and that there was of said ore "44,733 tons in reserve above the second level and 37,333 tons in "sight below the second level at the time of the purchase."

These are the figures which Olcott multiplies in obtaining his market value. There were no false representations claimed to have been made by the defendant, except the publication of the so-called Burnham report, speaking as of February 1, 1892, and no other frauds were claimed to have been practiced by him, except certain

alleged concealments and an alleged falsification of the mill run, leading up to an alleged deceit of Egan, the expert, who examined the property in November, 1893, just prior to the purchase.

Egan made a report, giving his opinion of the average value per ton of free milling-gold ore body in the mine, and his estimate of the number of tons of ore in reserve and ore in sight.

It further appeared that the mine was worked substantially all the time between February, 1892, and November, 1893 (fols. 1403, 882, 77, &c.). There could, therefore, be no assumption that there was the same amount of ore in reserve and ore in sight in November, 1893, as there was in February, 1892, nor that its appearance would indicate the same value per ton.

The assumption, therefore, that the statements in the Burnham report of estimates of ore in sight and in reserve and of the value of it were representations as to the amount of ore in reserve and in sight, and the value of it in November, 1893, was wholly without evidence to support it, especially in view of the fact that the expert Egan upon his own examination had made his own and a different estimate as to each of these three factors, and that plaintiffs purchased through him as their agent after reading his report.

Nevertheless each of the factors in the hypothetical question upon which Olcott bases his result of $902,000 is the estimate in the Burnham report as of February, 1892, and not the estimate in the Egan report as of November, 1893. The Burnham report gives the average value of $18 a ton (fols. 1430 and 1440): Egan, of $17 (fol. 1406). Burnham gives the total number of tons of ore in reserve and in sight at 82,000 (fols. 1433 and 1440); Egan, 66,000 (fols. 1406 and 1410), a difference computed in accordance with his method of $1 on 82,000 tons + $17 on 16,000 tons, or $356,000.

Furthermore, the question and answer assumed 37,333 tons in sight below the second level. The statements in the Burnham report were:

"The ore on the lower level *below the reserves* having been "opened in three places to an *average* of 33 feet (fol. 1438), this ore "in sight * * * gives a tonnage of 4,950 tons;" and "as both "the San Jacinto and Good Hope mines have produced beyond "question large sums of money, * * * reaching on the north "end of the ledge (San Jacinto) a depth of 110 feet and on the "south end 150 feet (Good Hope), leaving a large block of ground "between them. Now, as connection has been made with the

"south workings, and it is clearly proven to be one continuous vein, "and as the *surface cuts* and shafts show its continuity to the old "workings with * * * places ore in sight to at least the depth "of the present workings," between them "equal to 37,333 tons" (fol. 1440).

"In a few months this entire block" (*i. e.*, between the workings) * * * "can be placed as ore reserve" (fol. 1440). Egan's report says with reference to "ore in sight":

"I also measured and sampled the ore showing along the "bottom of the second level north and south as far as practicable "without taking up the track to get the foot-wall streak accurately, "and if anything it averaged larger in size than in the back of the "same level, hence it is fair to estimate it as ore in sight, the ques-"tion of its extraction being only of sinking the shaft 30 feet fur-"ther and driving levels from the bottom." He reckons this ore under his feet at 19,833 tons (fols. 1409-10).

Plaintiff's experts unite in admitting that there is not a recognized principle among reputable mining experts to estimate the value of ground beyond the development or below the development, and that ore in sight is what you can see and measure on the several side and is the same as ore in reserve (Foster, fols. 478-80; Olcott, fols. 737-8).

Olcott says: "I estimate the ore in sight by measurement, first "as to the ore *blocked out* and then by * * * carefully sam-"pling." Thus "that completes the ore in sight in my way of "estimating, and in reputable, correct practice. I do not estimate "ore an inch further down than the lower level; further than the "ends of the level each way" (fols. 737-8). "Nothing is figured in "the ore in sight unless you can get to the four sides of it" (fol. 740).

(Olcott continues, fol. 738:) "Q. And if that assumption is the "taking into consideration of any ore below the bottom of the level, "that should be thrown out, should it not?

"A. I should, in making a correct estimate; certainly. I am "not talking about the correct estimate.

"Q. And if your estimate takes in ore north of the end of the "drifts as they then appeared, that should be thrown out?

"A. It might be as a matter of precaution.

"Q. You have stated that you did not, in estimating the ore in "sight, take in beyond the workings in any direction?

" A. I have said that I did not, and I do not think correct prac-
" tice allows it.

" Q. So that, when you say that the mines have been sold on
" the basis of the ore in sight, you mean correct practice as to ore
" in sight ? A. I do, and on the statement of men who have a
" reputation " (fols. 738, 739).

The 37,333 tons mentioned in the Burnham report as ore in sight, and contained in the hypothetical question, being a guess as to the contents of the unexplored territory between the Good Hope and San Jacinto workings, Olcutt's admissions dispose of that as an element of value ; and the 19,833 tons mentioned as ore in reserve in the Egan report, being therein stated to be " an estimate of what " might be expected below the last workings," Olcott's admission disposes of that as an element of value.

The result of these admissions was, therefore, to strike from his estimate the entire ore in sight (so-called) assumed there, the ore assumed in the question being the entire ore in reserve or in sight proper to be reckoned in any estimate.

The exaggerations in estimated value, occasioned by the two erroneous assumptions in the question put to Olcott, and in his answer of $902,000 were, therefore, one dollar a ton (Egan's estimate being $17) on 82,000 tons—$82,000 ; the ore in sight, erroneously so-called, 37,333 tons, at $17 a ton, less $7 a ton estimated expenses, or $10 net, equals $373,330, or a total of $465,333.

Who can say that an erroneous assumption resulting in the exaggeration of an estimate of value by a half—that is, by $465,000—would have no effect upon the jury ?

We submit, therefore, that the motion appearing at folio 1349 to strike out the testimony of the witness Olcott on the ground that it affords no criterion to go to the jury—that, upon his own statement, in answer to the hypothetical question put to him, the data would not permit of an accurate answer, should have been granted, and that its denial was error.

The same errors enter into Olcott's estimate of $1,375,000. That estimate he obtained by multiplying the same tonnage of ore in reserve, plus the same tonnage erroneously stated to be " ore in sight," by $23.78 per ton, with respect to which last amount the statement in the hypothetical question is as follows : " That in a twelve
" months' mill run 2,434 tons of ore had been mined, and milled as
" mined from said mine, and had produced in bullion $57,879.78,
" being an average of $23.78 in free gold per ton " (fols. 721, 722).

There is no pretense of any such statement, except that plaintiffs claim it is contained in the Burnham report. That the resultant of the Burnham report is not the statement assumed, appears from a reading of it, and is discussed in the preceding part of this brief. But, in any event, the question does not state that twelve-months mill run is referred to, whether just preceding the purchase, or at some time or at any length of time before it.

The production of a mine, continuously worked, for any specified year, a number of years prior to a purchase, cannot, in the nature of things, be multiplied in obtaining its market value. In fact, it is inconceivable that any years' production, except the last one, could be treated as such a factor; and there is no pretense that this twelve-months mill run mentioned in the Burnham report could have referred to a mill run ending later than February, 1892—nearly two years before the purchase.

There are other assumptions in this hypothetical question, without basis in the evidence, as follows:

"Each level being in the vein its entire length on January 1, "1894":

Egan does not so report, and did not so testify. On the contrary, in his report of ore in reserve (fols. 1405–6) he does not reckon, in estimating the vein, 66 feet on the first level north, and 30 feet on the second level north, reckoning out of the 700 feet but 634 feet in one instance, and 670 in the other.

The Burnham report also, as a whole, does not state that each level was at that time in the vein its entire length. But whatever be the statement in the Burnham report, it could not have referred to, or been believed by the plaintiffs to have referred to, the period of Egan's examination of their purchase, in the face of his own report.

"That the levels were in ore at their ends, and that there was "nothing seen visible that afforded any reason for believing that "the ore did not continue in length for an indefinite distance":

There was no evidence as to representations by Sigafus or any one else on his behalf, that they were in ore at the ends.

There were boards at one end, and a heap of débris at the other. This evidence has been previously discussed. The experts on all sides agree that Egan was not warranted in believing or reporting anything with respect to these ends, without looking to see. Egan admits that the defendant did not make any false statements to him, but omitted to tell him that the workings ran beyond some parts at

one place, and a heap of dirt at the other (fol. 308). And further admits that with respect to the last he was told that the mine ran some distance further, but how much his informant did not know (fol. 230).

THE SECOND QUESTION AND ANSWER OBJECTED TO IS AS FOLLOWS:

Q. Assuming that the Good Hope Mine was opened up by two levels, each 950 feet in length, level No. 1 being 250 feet below the surface level, No. 2 being 100 feet below level No. 1, each being in the same ore body and connected with a main shaft 416 feet deep; and assuming that this ore had an average width of 18 inches, that it was not a continuous body, but pinched in and out in different places, so that one-fifth of the ground between the surface and the second level was barren ground; that beyond the north end of the apparent second level the level had been drifted not less than 80 feet in barren ground, the vein lost and nothing to indicate it extended beyond said north end, and thereupon this opening into the barren ground had been closed up and concealed from view; and assuming, also, that beyond the south end of the apparent second level, that level, for not less than 150 feet, had been driven in barren ground, the vein lost, and no indication that it extended further than said south end, and that this extension of the south end had been closed up and concealed from view; and assuming that the ore in reserve in said mine did not exceed 33,550 tons, without deducting any allowance for said barren ground; and assuming, further, that the ore in sight did not exceed in quantity 27,999 tons; and assuming, also, that the average value of the ore mined did not exceed $11 per ten; that the cost of mining and milling it was not less than $11 a ton, and that there was no reliable record of what it had done in the past, and that the mining claims, of which this mine was a part, were 4,000 feet in continuous length, and were developed only as herein stated; on those assumptions, what, in your opinion, was the fair market value of the property of the same date, January 1, 1894, including the mine?

A. I should say that such a mine was, commercially speaking, valueless, on the basis that it cost as much to extract the gold as the total product of the gold in ore (fols. 728–32).

The principal improper and objectionable assumptions in this question are as follows:

(1) *That the average value of the ore mined did not exceed $11 per ton.*

This being a question framed to elicit a reply as to what the mine was actually worth, the assumption should have been as to the average value of the ore which the mine actually contained.

The extent of the proof in this respect is tabulated in Plaintiff's Exhibit 25 (fols. 1589–93), and under the testimony goes no further than this, viz.: That the value per ton of what plaintiff's superintendents reported that they obtained from milling such rock as they took out and ran through the mill as ore, was $11.10 per ton. The testimony as to what rock they took out and what they milled for ore is set out at length at pages 63–71 of this brief above, from which it appears admitted that of the two veins the hanging wall vein and the rich foot wall vein there is no certainty that they took out any considerable portion of more than one vein in a place, leaving the other in place; that the method of stoping was such that the waste was inextricably mixed up with the ore, and that waste and ore together were run through the mill; the effect being that, in the first place, their results do not show what ore there was in the ground, and, in the second place, the average per ton of the rock through the mill as ore does not show and is not evidence of what the value of the ore aside from the waste was; that is to say, assuming that the custom was as Boicourt testifies, to run through waste and ore in about equal proportions. If two tons of the *mixture* averaged $11.10, as shown in their table, there must have come from the one ton of ore $22.

Owing to the impossibility of saving all the ore, the waste would rob and carry through in the tailings a further certain proportion of gold, so that in addition to the fact that the series of superintendents were either dishonest or incompetent and without experience, the admitted facts show that they did not take out the ore and that they milled ore and waste together, and there is absolutely *no* proof that the average value of the *ore* mined did not exceed $11 a ton.

B. That the cost of mining and milling was not less than $11 a ton.

This is a mere arbitrary assumption. There was no evidence introduced showing that the cost of mining and milling during any period before the sale was $11 a ton or any such sum. In any event, the proper assumption as to this would have been that

the fair and reasonable cost of mining and milling it was not less than so much a ton. The substance of plaintiff's testimony as to what it cost them is contained in Plaintiff's Exhibit No. 25, in which they show that the average cost per ton was $10.77 under their management, and there is an absolute absence of testimony that this was a fair and reasonable expense; but, on the contrary, in addition to the testimony as to the incompetence and dishonesty of the superintendents, all the experts who examined the property agree in fixing the proper charge for such expenses at about half of this (fols. 1222-3, 1272, 1275).

(C) *That beyond the north end of the apparent second level, the level had been drifted not less than 80 feet in barren ground, the vein lost and nothing to indicate it extended beyond the said north end.*

The proof as to this was that they had run off the vein, as Egan found afterwards, and that it was there simply a case of mistake of judgment in losing the vein; and, furthermore, that an upraise was then being worked which was in ore on its face; that the drift at the upper level had ore on its face, and the holes along the surface showed that the vein extended for hundreds of feet north of this point.

(D) *That beyond the south end of the apparent second level, that level for not less than 150 feet, had been driven in barren ground, the vein lost and no indication that it extended further than the said south end.*

Egan does not pretend this was barren, but "that the vein, or what little there is of it, was split up and deflected about 30 degrees, and was in hard, tight granite, and, so compared with the rest of the mine, was barren" (fols. 234-5).

Smith and Goldsworthy's samples from this vein averaged $6.70 a ton (fol. 1211, and Map Ex. I.).

The objections to the testimony of Egan as to value, upon hypothetical questions put to him, are taken at folios 277-78.

The questions objected to were, first, a question intended to elicit an estimated value of the property if it had been as represented, based on assumptions of material facts with regard to the property which plaintiffs claimed had been proved; and, second, a similar question as to its estimated actual value at the time of purchase.

The questions were each objected to as incompetent, immaterial and irrelevant upon two main grounds: First, that material representations were assumed to have been made—material facts were

assumed to have existed—without basis in the evidence; and, second, that the first question was based upon a misapprehension of the rule as to the measure of damages.

The questions and answers objected to are as follows:

"Q. Assuming that the ore body of the Good Hope Mine had "an average value of at least $17 per ton, and that the average "width of the vein was 24 inches; that the length of the vein "described by the workings was 950 feet; that the workings of the "mine consisted of the main shaft, 416 feet deep, and the south "shaft 391 feet deep, the south shaft being 250 feet distant from the "main shaft, with the drift in the first level at a depth of 250 feet "from the surface—950 feet long—with the opening of from 4 to 5 "feet wide, 5½ to 6½ feet in height, with the drift in the second "level, 350 feet below the surface—950 feet in length, with the "opening of the same size, this drift in the second level running "beneath the first for the entire length, and assuming that there was "nothing at the end of the drift to indicate that the vein pinched "out or disappeared, what, in your opinion, would have been the "fair market value of this property?

"A. From $700,000 to $1,000,000 (fols. 275-7).

"Q. Assuming the same conditions, with these modifications, "that the average value of the ore was $10 per ton, that the aver-"age width of the vein was 18 inches, and that the conditions on "the apparent ends of the drift of the second level were such as "you subsequently found them, and have heretofore stated on this "deposition, what, in your judgment, was the fair market value of "the property?

"A. About $50,000" (fols. 275-78).

The material differences in these questions, which produced in Egan's mind the difference of value between from $700,000 to $1,000,000 in one case and $50,000 in the other, were as follows:

Estimate of $700,000 to $1,000,000.	Estimate of $50,000.	
$17.	$10.	Average value of ore body of Good Hope Mine unextracted.
24 inches.	18 inches.	Average width of the vein.
There was nothing at the end of the drift to indicate that the vein pinched out or disappeared.	That the conditions on the apparent ends of the drift on the second level were such as you subsequently found them and have heretofore stated in this deposition.	

With respect to these three factors, Egan's testimony is as follows:

1. "Q. What was the average value per ton of ore that you "actually got out of the mine during the entire period that you "worked the mine, about one year? A. About $10" (fol. 265).

It will be noticed that this was not testimony as to what a careful examination would have indicated the value to be, nor as to what the value really was; but only as to the value of the ore which he took out.

It appears by the testimony as discussed in the preceding part of this brief, that the purchasers ran through ore and waste mixed in about equal proportions, thus reducing its apparent value by a half.

2. Egan says he measured every ten feet of the workings (fol. 322); that the measurements he took averaged from two inches to several feet; that there were about 200 measurements taken (which he did not produce), and that the average was 24 inches, and that after the whole interior had been exposed he found the average about 18 inches (fol. 237.)

With respect to this, Eagan made his own examination, and formed his own opinion. The experts agree that he was not warranted in assuming anything that he did not see with respect to the width and value of the ore.

3. With respect to the conditions at the apparent ends of the drift—that is, the boards at one end, and the heap of waste at the other, which he took no pains to investigate, not even the trouble to ask the defendant with respect to them he says himself:

"Q. Then, in your opinion and judgment, what was the differ-"ence in value of that mine as indicated by what you saw on the "second level, compared with the value you would have attached "to it if you had seen the concealed portions of that level? A. It "is a hard question to answer; but I would have made no further ex-"amination with the idea of purchasing; I would not have advised "its purchase (fols. 236–7).

"Q. If the drift had really ended where the defendant Cheatham "said, and if the mine had only been worked as far as they stated "to you, what, in your opinion, would have been its fair market "value in comparison with what it was, worked and open as it "actually had been? A. It would be hard to give in figures; but "in one case a prospective value existed which did not in the "other" (fol. 251).

In other words, this enormous difference of what Egan claims is market value is that in one case a prospective value existed which did not in the other.

His multiplication of what he says he found to be ore in reserve and in sight, by what he says he found to be its average value, reported by him to be about $797,674 in one case (fol. 1405), plus $337,161 in the other (fol. 1410), in all over $1,100,000, would not then have influenced him to buy the mine or to have recommended its purchase.

These admissions show clearly that the basis assumed in the questions intended to elicit from Egan his opinion as to the fair market value of the mine was wholly unreliable, and that his estimate was nothing but a guess.

This Egan admits (fol. 328): "Q. Then when you testified the "mine to be worth $50,000 or thereabouts, the $1,000,000 computa-"tion of value would be based upon portions of the mine you "didn't see? A. Yes, sir. but I saw the surface.

For a further and most material reason the hypothetical questions put to the experts were incompetent and inadmissible.

Plaintiffs' counsel failed to include in any of these questions, or to state in a separate question, the condition of the mine from 35 feet above the first or upper level to the surface. That is to say, a depth of about 200 feet.

Egan figures this (fols. 1405–6) First level north, 517 feet long by 224 feet high, ore in place, of the average width of 28½ inches, 22,517 tons, at $17 a ton	$382,789
First level south, 250 feet long by 210 feet high, ore in place, average width 20 inches, equals 8,020 tons, at $17 a ton	136,340
Total	$519,129

The height of these blocks is the estimated height from the top of the stope over the level to the surface.

All of the plaintiffs' witnesses who testified on the subject agree that from a point about 35 feet above the first level, or 200 feet down from the surface (fol. 1402) the distance between the two walls of the mine commenced to widen, and widen rapidly; that the two portions of the vein, that is, the foot-wall and the hanging-wall vein followed the widening walls, leaving large and blocky ground between, and that, for this reason, the upper portion of the mine afterwards proved to be much more expensive to work, and consequently of little value (fols. 674–9, 656, 425–53, 692–4).

There is no pretense that the defendant or any one knew or could have known of this condition of things in ground that was unexplored at the time of Egan's examination. Defendant is, therefore, not chargeable with any damages or loss or increased expense in working occasioned to the plaintiffs by reason of this fact.

This unknown fact, which illustrates the impossibility of assuming from any surface of rock that a particular vein will continue of a particular width, character and richness, for a given length and depth into unexplored rock, was of no small consequence; and the widening of the walls and the splitting of the vein by large and blocky ground, which was difficult and expensive to timber, affected an unexplored section of the mine (which Egan figures as ore reserves of a specified value) 767 feet long by 200 feet high, and his valuation of over $500,000 therefor.

Such an omission of a material fact, bearing directly upon the question of value, and admitted on all sides to have been something that no one could have known at the time, but to have been a factor which proved to seriously diminish the value of this portion of the property—could not but vitiate all the hypothetical questions which did not include it, and all the estimates based upon them.

This testimony as to the value of the property, if it had been as represented and as to what it actually was, given by Olcott and by Egan, is the entire basis for the extraordinary and excessive verdict of the jury, by which plaintiffs obtained a judgment for $184,000 more than the total amount paid for the property, and $289,000 more than their own investment.

It was, therefore, error in the Court to admit the testimony when offered, and further error to refuse to strike it out at the close of the testimony.

Hypothetical questions are allowed to be put to experts, but the hypothesis upon which they are examined must be based upon facts admitted or established by the evidence, or which, if controverted, the jury must legitimately find on weighing the evidence.

Matter of Maury, 60 Hun, 46.

"It is error to admit as evidence the opinion of an expert based "upon a hypothetical case, formed in part of facts of which there "is no proof."

Matter of Will of Ames, 51 Iowa, 596.
Jewett vs. Brooks, 134 Mass., 105.
Russ vs. Wabash, West. R. Co., 112 Mo., 45.
People vs. Sessions, 58 Mich., 594.

"Questions cannot be based upon suppositions of which there is "no evidence, tendency of evidence, or offer of evidence."

N. A. Acc. Ass. vs. Woodson, 64 Fed. Rep., 689.

2. "Immaterial matters introduced into a hypothetical question "will render it objectionable, because it thereby becomes misleading to the jury."

Russ vs. Wabash, W. R. Co., 112 Mo., 45.
Prentis vs. Bates, 88 Mich., 567.

3. "Material omissions in the statement of facts in a hypothetical question will render it inadmissible."

Marshall, &c., Co. vs. McKelvey, 55 Mo. App., 240.
Barber's App., 63 Conn., 393.
Prentis vs. Bates, 88 Mich., 567, at p. 590.
Briggs vs. Minn. St. R. Co., 52 Minn., 36.

In *Waring vs. The United States Telegraph Company*, 4 Daly, 233, it is said in respect to testimony improperly admitted: "We "cannot say the jury were not influenced by it; that it could not

" by any legal possibility have affected the verdict; and, where such " is the case, the only safe course is to order a new trial."

The Court erred in denying the motion to dismiss the complaint.

Assignment and specification of error, No. 24.

This motion first occurs at the close of the plaintiffs' case (fols. 752–56), and is renewed at the close of the testimony (fols. 1350–53), and is as follows:

" I move to dismiss the complaint, on the ground that the cause " of action set forth in it has not been proved. The cause of action " set forth in the complaint is, in substance, that the defendant " through one Willim H. Griffith entered into negotiations with the " plaintiffs for the sale to them of certain lands and mines, mining " claims and appurtenances, and that prior to the 28th day of De- " cember, the plaintiffs entered into negotiations for the purchase " of said lands, and the defendant falsely and fraudulently repre- " sented to the plaintiffs the misrepresentations which have been " stated by counsel for the plaintiffs in his opening, and did to the " plaintfffs the fraudulent acts which are complained of. I move to " dismiss the complaint, on the ground that this cause of action " has not been sustained.

" 6. That there is no evidence that the plaintiffs in this case " relied in any manner upon the statements which were made by " Mr. Sigafus " (fols. 752–56; 1350–53).

This motion was denied at the close of the plaintiffs' case, and also at the close of the testimony, to each of which rulings the defendant by his counsel then and there duly excepted.

The Court below, without passing upon the question whether the cause of action set out in the complaint was proved, held that the omission to except to that portion of the charge of the Court which directed that the jury might find for the plaintiff on a cause of action different from that pleaded, was, in effect, a waiver of the exception to the motion to dismiss (Rec., p. 620), but plaintiff in error respectfully contends that exception, duly taken, to refusal to dismiss at the end of plaintiff's case and at the end of the whole evidence, placed clearly on the ground that the cause of action set forth in the complaint is not proved, is sufficient. After a question has once been distinctly passed upon and exception taken, it is not necessary to multiply exceptions by repetition when the question

arises again. If it was curable by amendment of the complaint, that could have been done, and it was the duty of plaintiff to move such amendment when the motion was made to dismiss.

There was no pretense of any direct communication between plaintiffs and the defendant prior to the purchase by plaintiffs.

Egan went out to examine the mine in the hope that he and Morse and Platt (who afterwards dropped out of the venture) might be able to turn the matter in some way to their advantage.

Egan made a report in writing (Plaintiffs' Ex. C, fols. 1392–1415), addressing it to Morse, under date of November 29, 1893, together with the so-called Burnham report (Plaintiffs' Ex. A, fol. 1416), which bore no date or signature, and which contained apparent errors of computation and summary, some of which have been already noted in this brief.

This Eagan report and the so-called Burnham report, which Egan stated he visited the Good Hope for the purpose of verifying (fol. 1392) were submitted to the plaintiffs. Egan says: "I also made oral statements to Mr. Morse, Mr. Porter and Mr. Hobson. These three I referred to my report and the statements made in my report, and advised to purchase (fol. 273).

The plaintiffs testify as to what they relied on, as follows:

Morse says that after he had met Egan and Platt in New York, upon Egan's return to the mine, and Platt had failed them (fol. 362), he (Morse) went over to Haverhill to see if he could interest his friends there in the enterprise, and took the report to Hobson. Hobson asked to show it to Porter (fols. 362-63), and later Porter and Hobson asked whether Egan could be seen, and Egan was sent for and introduced to Porter and Hobson, and showed samples of ore, and then they went to Boston, and the trade was made (fols. 363-64). "I depended in going into this enterprise and in getting "these other people to go in with me, on the report of Egan. Q. "What dependence did you place, if any, upon the Burnham re-"port? A. That he had verified it" (fol. 264).

Hobson says: "I depended upon the statements in these two "reports. * * * The next day I made inquiries about Col. "Egan (fol. 398). The credit that I gave to this paper, this Burn-"ham report, was based on the information that I had from Mr. "Morse or Mr. Egan, or both, that this was a report made by a Mr. "Burnham, a mining engineer, and the confirmation which Mr. Egan's report gave to this report (fol. 495)." He then admits that "if he had examined the Burnham report with any care he would

have noticed the erroneous summaries and discrepancies in it; and finally admits: "I mean to say that I relied upon the Burnham "report as confirmed by Col. Egan" (fol. 414).

Porter says that he relied only upon the Burnham report as corroborated by Egan (fol. 528), and that if he had examined the Burnham report with any care he would have noticed its discrepencies (fols. 528 *et seq.*).

In other words, it was Egan's report of what he claimed to have seen and ascertained upon which the plaintiffs relied in making their investment. It appears, however, conclusively by the admissions of Egan that he did not report what he found with respect to some things; that he reported as facts other things which he did not attempt to verify, and that certain of his estimates proved fallacious, owing to facts that no one knew at the time of his examination.

Egan's Fraudulent Misrepresentations and Mistakes.

The examination of the witnesses and evidence introduced by plaintiff when dissected upon cross-examination and analyzed, disclosed most material fraudulent misrepresentations and mistakes to have been made by Egan—first, in his statement of the actual results of his examination; and, second, in the method of it, as stated by him—and also that certain estimates made by him proved fallacious, owing to facts that no one knew at the time.

First. His misstatement of facts disclosed by his examination.

(A) Measurements.

Egan gives dimensions of the blocks which he uses in figuring the contents by the length of the levels and the measurements down the shafts.

As to discrepancies in the length of the levels, nothing appears, for they were extended by the new management.

The careful survey made by Smith and Goldsworthy and introduced in evidence (Defendant's Exhibit I.) and admitted by plaintiffs' witnesses to be correct, and testified to by Mr. Smith at folios 1218-19, discloses the following discrepancies:

Depth of first level stated by Egan *250 feet*, actual depth *236 feet*, distance between levels stated by Egan *100 feet*, actual distance *94 feet*, and it further shows by the level drawn at the top of the shaft, that this distance down the shaft is greater than the average distance of the level below the grass roots, on account of surface displacements.

B. Bullion returns, which Egan says were shown him:

Months.	Certificate.			Egan's Stmt.		
	Tons.	Amount.	Average.	Tons.	Amt.	Avge.
July	160	$2,757 47	$17 25	160	$2,760	$17 25
Aug. & Sep.	300	$4,893 56	$16 03	300	$5,008	$16 69
October	112	$1,362 23	$12 16	112	$1,850	$16 52
Grand Average			$15 76			$16 81

C. Average assays:

Egan's statement in the report (fol. 1404) "average of assays "made, exclusive of high assays, such as those previously men- "tioned, was $23, and one made of the eight-inch streak in the "breast of the first level north, $884.40." Details of these assays are not given in the report, but in Egan's letter (Defendant's Exhibit C, fols. 1665 to 1667) it appears, as computed by Mr. Smith (fol. 1216) that this average was *but $17.44*.

Again Egan reports the sulphides carried an average value of about $7 a ton in the tailings (fols. 1404–5), and the loss in tailings (fol. 1407) is reckoned by him at $7.

His same letter (at fol. 1665) contains the statement that he must have made some serious mistake in sampling the tailings, as Mr. Graham's assay gave $2\frac{80}{100}$ ounces gold and $1\frac{70}{100}$ ounces silver, while the crude ore ran $1\frac{50}{100}$ ounces gold and one ounce silver, showing (fol. 1217) the true assay of the tailings to be $57.88.

Again Egan's report gives (fol. 1407) "crude ore assaying *$38 "per ton*," whereas his letter, Exhibit C, folio 1665, shows (see fol. 1216) an average of only *$31*.

(c) Egan's test mill run:

Sixty-two skip loads were hoisted to Egan's knowledge, stated by him in his report to have been taken from the quartz alone, that is, sorted ore. This mill run, he reports (fol. 1407), to be *of 25 tons*. These 62 skip loads held, it is admitted on all sides, *from 40 to 47 tons* (fol. 1220). Egan knew this (fols. 320–1).

Again Egan reports the retort 51 ounces (Troy) of gold 710 fine (fol. 1407), $724. His testimony (fol. 326) is 55 ounces avoirdupois, which gives (fol. 1217) $674.87.

Again, his report (fols. 1406-7) and his testimony (fol. 258) gives the average of this mill run to *be $16.97*, whereas the true average, computed upon his own figures (fol. 1220), *gives only $15 to $17*.

Egan's true mill run therefore, $15 to $17, is substantially the same as the true average of the bullion receipts July, August, September and October, 1893, upon which alone he claims to have relied as to the past history of the mine in this respect, and which were the only bullion receipts or statement of bullion receipts which he claims were shown him. It agrees substantially with the testimony of Sigafus as to his production, with the average value stated in the true Burnham report (fol. 1655), and the average value shown by Smith & Goldsworthy's examination (fols. 1189, 1274). These errors and extraordinary exaggerations, considered in conjunction with his letters to Morse and Platt, written at the time of the examination, disclose the true character and purpose of Egan in making his examination and report, *viz.* : to exaggerate the value of the mine for the profit he expected to make out of it.

SECOND. His errors in the method of his examination as stated by him.

A. As to computation of ore in reserve, Egan made two errors, according to the testimony of experts on both sides.

First he estimated as ore in sight in present working below the second level, 19,133 tons, at $17, $337,161 (fol. 1413). This was estimated to a depth of 30 feet below the bottom of the shaft (fol. 1410). The only possible measurements that he could make or says he made are along the bottom of the level, that is, the top of this block, and "by an examination of the shaft when the water was lowest and very careful inquiry," but he does not say of whom (fols. 1409-10). The experts on both sides agree that this was improper.

Foster, plaintiff's expert, says :

Q. "How far down below the last level did you usually reckon "ore in sight?"

A. "Right on the upper surface on the bottom of that level;" "I understand ore in sight means what you can see and what you "can measure;" "I should not think it differs from the proper "reserve."

Q. "Do you reckon any ore below the lowest level as ore in "reserve."

A. "Not in setting a value for a prospective purchaser."

Q. "Are the principles of such estimates well understood among "mining experts?"

A. "Yes, I think so. It is not a recognized principle among "mining experts to estimate the value of ground below the lowest "developments of the mine" (fols. 477–479).

Olcott, also plaintiff's expert, says: "I estimate the ore in sight "by measurements, first, as to the ore blocked out, and then by "careful sampling as to the value of that ore. That completes the "ore in sight in my way of estimating and in reputable correct "practice. I do not estimate ore an inch further down than the "lower level; further than the ends of the level each way" (fols 737–8).

"Nothing is figured in the ore in sight unless you can get to the "four sides of it" (fol. 740).

His second mistake is that he believed and assumed that certain portions of the levels, which were stulled and lagged, that is, covered up by timbers and boards, would show continuous ore back of the stulling and lagging, without making an examination of them.

Egan nowhere says that he was so deceived, and his report shows that he was not deceived. He reports that he measured every ten feet, and in the table of ore in reserve (fols. 1405-6) omits 66 feet in lineal measurement of the 700 feet which he gives as the length of the first level north and 30 feet in lineal measurement of the 700 feet which he gives as the length of the second level north. There is no evidence that he was told anything in regard to it, and experts on both sides agree that he was not warranted in any such assumption.

Olcott, plaintiffs' expert, says:

Q. "But suppose you do not break in there and do not examine, "would you, or would you not, figure it in?"

A. "Your hypothesis is not intelligible."

Q. "Then you would break through and examine it?"

A. "I certainly would."

Q. "In case an expert did not break through and examine it, "should he, or should he not, figure it in as ore in reserve or ore "in sight?"

A. "He should not figure it in as ore in reserve or in sight "without examining it" (fols. 742–43).

B. Egan also claims to have been deceived into believing that

the second level ended at the north where a heap of refuse filled the end, and at the south where boards filled the end. He testifies that the defendant made no representation in regard to it to him, other than omitting to draw lines there on a rough sketch or map, which he says was a sketch of the main workings of the mine and that he relied upon the statements of the foreman of the mine, Cheatham, that the level ended in the boards at the south end, and that he, Cheatham, believed that it went to a few feet further than the debris in the north end, but did not know. The experts on both sides agree that such a conclusion was unwarrantable.

Olcott, plaintiffs' expert says :

Q. "In case a reputable expert at the end of the level where "there is no stope, but an upraise, came to a heap of refuse lying "at the bottom of the upraise, what should he do in regard to "that heap of refuse? Assume that it is the end of the level?"

A. "He ought not to take any chances."

Q. "Should he rely on the statement of the miner that 'I don't "'know how much further that was driven; I was not there then, "'but think it was no more than three or four feet.' Would he be "warranted in assuming that that was the end of the level?"

A. "No, sir; he would not."

Q. "In case an expert comes to a planking set up at the end of "a level, should he or not assume that that was the end of the "level?"

A. "He should not."

Q. "Would the failure the owner of to notify him that that was "not the end excuse him from investigaton?"

A. "It would not."

Q. "Would the failure of the owner to notify him that the heap "of refuse was not the end excuse him from making such an exam-"ination of that refuse heap?"

A. "It should certainly be moved" (fols. 743–44).

This is corroborated by the defendant's experts (fols. 1207, 1270). It is difficult to see from the evidence any warrant for the conclusions that Egan was deceived as to either of these ends.

Egan says: "In the north drift it was simply a mistake in judg-"ment in losing the vein (fol. 235). "At the breast of the north "drift there was no ore whatever, only a streak of rotten granite "that had evidently run off the vein, as we found afterwards" (fol. 234).

"In the south drift it showed the termination of the ore body "disclosed in the workings between the main and the south shafts." "In fact it looked as if the vein had split up, never to come to- "gether again" (fol. 235).

"At the south end the vein, what little sign there was of it, was "split up and deflected about 30 degrees, and is in hard, tight "granite, and so, compared with the rest of the mine, is barren" (fol. 235).

At the south end there was a dyke or intrusion of country rock which nearly shut off the vein so that it showed in a thin seam between walls of hard, tight granite. This dyke or intrusion of country rock shows upon the surface in outcroppings of rock or niggerheads just south of the south shaft, which cannot be followed to the north (fol. 902).

Egan and Sigafus walked over the surface (fols. 222, 901) where this outcropping was visible, and, in addition the fact that Sigafus testifies he explained this matter to Egan, and that Cheatham testifies that he and Egan went into this dyke on the second level south of the main shaft, there is the statement of the Burnham report, which Egan says he had in hand. "To the south the vein "had been found and still shows good pay, though the streaks "divide and probably the end of all pay ore to the south, is covered "by locations owned by the Company" (fol. 1424), and the entire absence in either the Burnham or Egan reports of any estimate or statement of value of this south end.

Egan's report, folio 1413: "Besides this ground (that is, the "open ground and that to the north) there is territory to the south "1,900 feet long, with an undeveloped value."

Egan's estimate of the value of the property is $797,000 ore in reserve between the ends, as he found them, and below the lower level, $337,000. Beyond the workings, to the north of where his examination was made $991,000 (fol. 1413), showing an estimate by Egan of over $1,100,000 between the ends as he says he saw them, but he says at folio 237 of his examination:

Q. "What in your opinion and judgment was the difference in "value of that mine as indicated by what you saw on the second "level, compared with the value you would have attached to it if "you had seen the concealed portions of that level?"

A. "It is a hard question to answer, but I would have made no "further examination with the idea of purchasing."

The experts agree, however, in the rule stated by Olcott and Foster, plaintiff's experts : " It is not a recognized principle among " reputable mining experts to estimate a value on ground beyond " the development " (fol. 480).

In determining the value of mines for prospective purchasers, Foster says : " I do not take into account any prospective value of " ground beyond the development at either end of any of those " mines " (fol. 477) ; and Olcott : " I do not estimate ore an inch " further than the ends of the levels each way " (fol. 738).

THIRD. Certain estimates made by Egan proved fallacious, owing to facts that no one knew at the time of his examination.

He reports : " This mine is not as expensive as the ordinary " mine to work, from the fact that the walls are hard and regular, " and the dip of the lode relieves the walls from the weight, so that " at the height of thirty feet the debris rests on the foot wall " (fol. 1400).

And he testifies (fol. 316) : " The width of the fissure was from " a few inches to five or six feet, or more or less."

At this time the stopes were at an average height of 20 feet. Egan figures the entire vein upon the basis that this width of fissure will continue to the top. Such, however, did not prove to be the case.

Morehead testifies : " The vein 30 or 35 feet above the first level " commences to diverge—to split. The waste material between the " foot wall and the hanging wall increased in size (fol. 648). The " veins were diverging very rapidly going upwards, and the com- " pany had quit operations, probably because it was costing them " so much " (fol. 647).

Foster says (as of the time when he arrived) : " The ore had " practically all been taken out 70 feet above the first level. Further, " to the grass roots, the main portion of the ore was in place. It " was dangerous ground. A man was liable to lose his life there " any minute, and it was never measured to the top, to measure it " exactly. They were old stopes that were shaky, and it was hard " to get a man to go there at all " (fol. 425). " Above the first " level, above these old stopes, the vein was broken up into a number " of quartz veins, varying in thickness from two to three inches. In " the surrounding ground, the granite, is what we call underground blocky ; it would come out in great big chunks, so that in order to take out eight inches of quartz you would be obliged to take out

from 12 to 15 feet of waste rock. It would come out itself, and it took a great deal of timber to hold it, in addition to being quite dangerous to the men. There were no places in these old stopes above the first level, where there was no quartz at all (fols. 426-453).

Boicourt says (fol. 693): "Above the first level the fissure "widened as you went up. The true foot and the true hanger walls "went away separate a good many feet. That was the reason that "made it especially expensive above there on the north side of the "old first. Up a ways in the stopes, above the first level, the foot "and hanging wall parted and went away off, and it was up in that "space that it was so very expensive to mine" (fols. 693-94).

Boicourt gives this widening of the fissure as the true cause (fols. 692-94). Morehead agrees with him, that it was more expensive to mine there, a great deal, than it was below (fols. 649, 656).

There is no proof that Egan was the agent of Sigafus for any purpose. Proof of deceit of the plaintiffs by Egan is not sufficient under the pleadings in this case, whatever may be the proof as to Egan's excuses for his mistakes and misrepresentations, to charge the defendant with them.

It may be that in a proper action under proper pleadings and upon proof that Egan was deceived by the defendant, and that defendant intended that Egan should publish a report, the contents of which he knew, founded upon such deceit, for the purpose of selling the mine to the public, and that they—a portion of the public—afterwards bought it, plaintiffs could recover, but such was not the proof here, and that is not this action.

Plaintiffs having been deceived by Egan's mistakes and false statements as to the material facts, with respect to which there is no pretense that Egan was deceived by defendant, cannot recover of defendant in this action.

The Supreme Court of Illinois, in the case of *Wachsmutch vs. Martini*, decided November 27, 1894, and reported in 39 N. E. R., 129, and 154 Ill., 515, discussed this question in a well-considered opinion, and in deciding the case held the above principle.

This was an action by plaintiffs, wholesale dealers in clothing, against defendant, a retail dealer, for fraud and deceit. Defendant ordered a bill of goods from plaintiffs through plaintiffs' salesman, and plaintiffs thereupon applied to a mercantile agency for a statement. The agency then wrote the defendant, requesting a state-

ment of his financial affairs and enclosed a blank for it. Upon receipt of this letter and blank defendant turned them over to his confidential clerk and bookkeeper with instructions to fill out the blank so as to show the condition of his assets and liabilities. The clerk answered in writing certain of the questions on the blank, and mailed it to the agency. Some of the material *statements inserted by the clerk and signed in defendant's name were false.* This latter fact does not appear in the opinion cited, but in the opinion of the Appellate Court below (45 Ills., App. Ct. Reps., 244). The Mercantile Agency, upon this statement, delivered to the plaintiff a statement containing totals, which totals were exaggerations of the totals properly calculated from the defendant's statement. Upon receipt of this report from the Mercantile Agency plaintiffs accepted the order and shipped the goods. Plaintiffs' credit-man testified that he relied upon the statement of the Mercantile Agency.

Defendant afterwards sold and assigned a portion of his property, and *confessed judgment upon a note which did not appear in the statement which had been sent by his clerk* to the Mercantile Agency, and upon execution under this judgment the rest of his property was sold.

The Court says: "*Here the statement which the Mercantile* "*Agency received* * * * *was materially and substantially dif-* "*ferent from that which the Agency submitted to appellants.* Which " of these two statements induced the appellants to give credit to " appellees and ship the goods?" "It was not the written state- " ment made by appellee or his agent * * * that appellants " relied on or that induced them to act as they did." "Some of the " items in the two statements are identical; others are very dif- " ferent." * * * "It would be mere surmise to conclude that " if the report to appellants from the Mercantile Agency had corre- " sponded with the statement forwarded * * * they nevertheless would have filled the order. A cause of action cannot be con- " structed upon so uncertain a foundation as a mere conjecture."

The Court erred in admitting evidence as to the acts, statements and declarations of Cheatham during Egan's examination (Assignments of Error 1 and 2).

The pretended basis for the introduction of this testimony was as follows:

Cheatham was acting foreman at the mine at the time Griffith asked permission of Sigafus for Egan to make his examination (fol. 22). After Egan had walked over the surface, at the collar of the shaft, as he was about to descend it, he was introduced by Sigafus to Cheatham as the man who had formerly been timberman, but was acting as foreman of the mine (fol. 227). After the three had gone down to the first level, Sigafus returned to the surface, saying he had a bad cold, and portions of the mine were hot, and others wet (fols. 228–22). Egan says that Sigafus then "in Cheatham's "presence told me that he [Cheatham] would go with me and ex- "plain every detail of the property, and give me every assistance "in his power—in fact, placed Cheatham's services at my discretion. "This was before I had begun my exploration of the mine. I "commenced the practical part of it as soon as Mr. Sigafus went to "the surface" (fol. 228).

Again: "Mr. Sigafus did not place any limitation of my time "for making the investigation" (fol. 306).

Again: "In my experience as a mining expert, in passing upon "the value of such property, before I recommend the purchase, I "make an independent examination. I did verify Mr. Sigafus' "statement to the best of my ability, and with the means at my "disposal" (fol. 308).

Griffith, plaintiffs' witness, says: "I remember Mr. Sigafus "telling Egan that he could examine the property in his own way, "and do as he pleased with it."

Egan desired a mill run and Sigafus told Cheatham that he was under Egan's charge; that Egan had full control of the mine for the mill run (fol. 791), and Egan ordered Cheatham to attend to a portion of the work in sending up the ore, going round himself to see where everybody was working (fols. 797–98, 245–46).

Sigafus was not present at the time of any of the alleged statements made by Cheatham or directions given by him, or at the time of any of his alleged fraudulent acts; and there is no evidence that he knew of any of them.

The experts of both sides agree as to the method of examination in such cases by experts. Olcott (fols. 738–45), Foster (fols. 477–80), Smith (fols. 1229–31) and Goldsworthy (fol. 1272) say that experts when examining a mine select their own samples, and do not rely upon any one connected with the mine to do it, and when they make a mill run do not lose sight of the men.

Under the practice of experts in such cases, and the facts proved as to the circumstances under which Cheatham is alleged to have made the statements, and the capacity in which he acted when he is alleged to have done the acts complained of, none of them can be charged to Sigafus.

Cheatham was not an agent for the purpose of making or assisting in making any sales or contracts for the defendant, nor had he ever been. He was foreman of the mine underground. The mine was put under Egan's control for the purpose of making his examination, and Cheatham was directed by defendant to go with Egan and do what he was told to do—in effect, the entire force of the mine under Cheatham was placed at Egan's disposal (fol. 228).

If a contract is induced by the fraudulent representations of third parties, there can be no relief on the ground of fraud, unless they are knowingly taking advantage of by the defendant, except where it is fraud of an agent, committed within the scope of his authority.

Fischer vs. Boody, 1 Curt., 406.
McPherson vs. Sanger, 1 Woodb., 138.
Korn vs. Hurd, Eng. App. Cases, 495.

But even the false and fraudulent acts of an agent, made in the course of his employment, while they may render the principal liable in an appropriate action, will not do so in an action for deceit, unless the principal co-operated in the agent's misdeeds.

Wachsmuth vs. Martin, 154 Ill., 515; and 45 Ill. App. Ct. Reps., 244.
Frayer vs. McCord, 165 Pa., 539.

"It is essential that the defendant's representations should have "been acted on by complainant to his injury. Where the purchaser "undertakes to make investigations of his own, and the vendor does "nothing to prevent his investigation from being as full as he "chooses to make it, the purchaser cannot afterwards allege that the "vendor made misrepresentations (*Attwood v. Small, supra*; "*Jennings v. Broughton*, 5 de Gex, Macnagton and Gordon, 126; "*Tuck v. Downing, supra*)."

Southern Development Co. vs. Silva, 125 U. S., 247, 259.

That the Court erred in admitting the letters of Egan written to Platt, a stranger to the transaction; to Roberts, a stranger to the transaction; and to Morse, during Egan's examination.

Assignments and specifications of error 14, 15 and 16.

These objections were taken at folio 395, and the letters and telegrams were admitted in evidence as Exhibits 13, 14, 15, 16, 17, 18 and 19 (fols. 1546-1565). These letters were objected to by defendant's counsel as not binding on the defendant, and as immaterial, irrelevant and incompetent. They were introduced upon the following basis only. *That those* letters *were* in Mr. Egan's handwriting. That the five exhibits 13, 14, 15, 16 and 17 were received by Morse in due course of mail; were all in relation to the mine, and that he had placed dependence upon the statements in these letters, among other things (fol. 394). There was no proof that Sigafus knew of these letters or of their contents, or authorized them, or knew they were going to be written, or that any one but Morse ever saw them. They were not produced or offered by plaintiffs, until Egan's examination had been closed, and Egan was dead. There can be no pretense that they are proof or evidence of any of the statements therein contained. All that, under any circumstances they could prove was that Egan, at that time, said he had been doing certain things and believed certain things. He reported as to what he did and believed, and the report was received in evidence; he had been examined as to what he did and believed, and that examination had been introduced in evidence.

We submit that the admission of these letters cannot be justified under any principle of law, and was error.

The next two letters, Exhibits 18 and 19, objected to on the same ground, were letters from Egan to Platt and from Egan to Roberts, Platt's secretary (fol. 396). Morse does not testify that he ever saw these letters or relied upon them, and we cannot imagine upon what theory they were admitted in evidence. They were certainly incompetent and irrelevant.

These letters having been written by Egan to these parties during his examination, with the very evident intention of arousing such an interest in the property that they would assist him in the purpose he had formed to make a personal profit in the matter, contain many grossly exaggerated statements. Under the ruling of

the Court, admitting them in evidence, the jury may well have understood that defendant was chargeable with these statements as representations, and that they were evidence of deceit practiced by him upon Egan. For this error a new trial should be granted.

Every error clearly shown to exist is *prima facie* injurious to the appellant, and raises the presumption of prejudice. "To disregard such evidence the Court must be able to say that injury has not resulted, not that it cannot see that injury has resulted."

Mexia vs. Oliver, 148 U. S., 664.
Livingston vs. Met. E. L. R. Co., 138 N. Y., 76.
Atwood vs. Welton, 67 Conn., 514.
Start vs. Wellman, 96 Cal., 400.
Brown vs. Klock, 117 N. Y., 340.

UNLESS, THEREFORE, THE COURT CAN SAY THAT THE IMPROPER EVIDENCE ADMITTED FOR THE PURPOSE OF CHARGING THE DEFENDANT WITH FRAUD IN EACH AND EVERY ONE OF THE ABOVE-MENTIONED CASES WAS NOT INJURIOUS TO THE PLAINTIFF IN ERROR, THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

The Court erred in admitting evidence offered by plaintiffs for the purpose of charging the defendant with damages to others than the plaintiffs personally, and for the purpose of charging defendant with damages to all the subscribers to the subscription paper, Exhibit 1, and to the stock of the Good Hope Mining Company, afterwards incorporated under this subscription.

Assignments and specifications of errors Nos. 12, 13 and 27.

The objections and exceptions appear at folios 366, 493-7, 500, 502, 1356, 1384-5.

The allegations to the complaint under which plaintiffs claim to recover for the subscribers to this subscription paper and the company's stock is as follows: "That plaintiffs throughout the trans-" actions hereinbefore mentioned were acting jointly for their own " benefit and for the benefit of others associated with them in the

"enterprise, and the contract of purchase hereinbefore mentioned "was made with the plaintiffs, in their name, for their own "benefit and that of their associates jointly interested with them; "and they now sue as the trustees of an express trust, in accordance "with the laws and practices of the State of New York" (fol. 26).

Out of over thirty of these subscribers five only testified in the case, or made any claim to having been deceived by the defendant in any particular. These five were Porter, Hobson and Morse, the plaintiffs, and Wood and Egan. Their aggregate investment, after deducting the $45,000 in cash paid Porter, Hobson and Wood, on the sale and conveyance of the property to the subscribers forming the Good Hope Mining Company was: Porter, $15,000; Hobson, $15,000; Morse, $15,000; Wood, $15,000, and Egan, $15,000—money borrowed from Hobson—or a total of $90,000.

The facts proved as to the capacity in which plaintiffs acted are as follows: The matter was brought to the attention of Hobson at Haverhill by Morse, and to Porter's attention by Hobson. Morse then sent for Egan to come to Haverhill. Egan went to Haverhill, and was introduced by Morse to Porter and Hobson (fol. 363). In a few days Morse and Egan wired Griffith to go to Boston. He went, and there met Morse and Egan, who told him they were making a sale in Haverhill. Griffith stayed in Boston about a week, and there met Hobson and Jones, the lawyer, and the contract of sale by Griffith to Porter, Hobson and Morse, and of purchase by Porter, Hobson and Morse from Griffiths was drawn up, signed in Haverhill and in Boston, and delivered (fol. 567).

This agreement (Plff.'s Ex. 1) was dated December 18, 1893, and presumably delivered on that day (fols. 1474, 1485). That is a contract for the purchase by Porter, Hobson and Morse in their individual capacity, and provided for the payment by them, in their individual capacity, to Griffith, of the cash payment therefor, and for the delivery of the mortgages by a corporation to be organized by them. But there is no mention of any associates either in the purchase or in the corporation.

At this time, when Porter, Hobson and Morse had contracted to purchase and pay for the property, there is no evidence that any one had been spoken to in regard to it other than themselves. Wood, whose name appears on the subscription paper (afterwards circulated) directly under the signature of Porter, Hobson and Morse, testifies (fol. 499): "I could not give the exact date on "which I put my signature there. It was some time between the

" 18th, the date of this, and date Mr. Morse went to California" (*i. e.*, the 23d).

At the time of the contract of purchase, therefore, and at the time of the assumption of the liability on the part of Porter, Hobson and Morse to take the title and pay for it themselves, they were not trustees of any trust for anybody, and to that extent were not acting throughout the transactions "jointly for their own benefit and " for the benefit of others associated with them in the enterprise." Nor was the contract of purchase made with the plaintiffs " in their " name, for their own benefit and that of their said associates, " jointly interested with them," there being no associates at that time.

Thereupon a subscription paper was started by Porter which was introduced in evidense, over defendant's objection and exception, as Exhibit No. 2 (fols. 1489–1501). This subscription paper appears on its face to have been started for the purpose of enabling the plaintiffs to relieve the sellers of a portion of the liability they had already incurred. It provides, in substance, that the subscribers thereto agree to pay to Porter on January 1, 1894, their several subscriptions to the amount of $175,000, $150,000 to be applied upon the purchase price of the Good Hope mining property, and $25,000 for the erection of a twenty-stamp mill. The subscriptions, however, are expressly provided in this paper to be made upon condition that $175,000 for payment January 1, 1894, be fully subscribed.

At the time this paper was offered in evidence there was no testimony as to how the subscriptions were obtained, nor when they were obtained, nor whether the subscription paper had ever been filled, it appearing upon its face to have had $168,000 of subscriptions out of the $175,000, which by its terms were required to be subscribed before the paper became operative.

Defendant's counsel objected to the offer, if it was introduced as evidence of liability to anybody except the individual plaintiffs in the case, and as immaterial. The objection was overruled, and exception taken and allowed. Thereupon plaintiffs' counsel read as signers to the subscription paper: "John M. S. Egan, $10,000; " Charles W. Morse, $15,000; John L. Hobson, $15,000; Dudley " Porter, $15,000;" but omitted the other executions and amounts (fols. 366–67).

No further testimony was offered as to the dates or the making of the subscriptions by any of the alleged subscribers to this paper, or the considerations or representations upon which their subscrip-

tions were made, prior to the next offer of the paper in evidence, except that Wood says: "At or about that time" (*i. e.*, the time he made his investment) "I obtained some subscriptions from different "associates. The Burnham and Egan reports I used in obtaining "these subscriptions" (fol. 493). Plaintiffs' counsel thereupon offered to read the other subscriptions, and this was objected to as incompetent and immaterial, and on the ground that the plaintiff cannot in this action recover in a representative capacity for an alleged deceit practiced upon these other subscribers, at least until there is proof that the other subscribers were deceived, so that they could individually maintain an action for deceit.

Plaintiffs' counsel thereupon said: "We will offer these other "signatures. As the point is taken that there can be no recovery "for the othef subscribers, now we offer to prove the fact of their "subscriptions, and the amounts of their subscriptions, and *then we "will put in other evidence.* Does your Honor admit it?

"The COURT: Yes" (fol. 495).

To which ruling counsel for the defendant then and there duly excepted.

Defendant's counsel then further objected that it has appeared by the evidence already, that unknown portions of these subscriptions were not made until long after this transaction was closed. The plaintiffs' counsel thereupon stated the position as to that, as follows: "The evidence is that although these subscriptions had "not all of them at that time been actually made, these gentlemen "went ahead completing the contract to purchase, intending to "associate with themselves other parties, and in a very few days "they did associate other parties, and at the time that they made "the purchase, although these other parties had not actually "joined, they were making the purchase for the benefit of those "others who should be associated with them. That is the posi-"tion." "The COURT: I shall permit the subscription to be read, "and I will give you an exception." Whereupon the full list of "names was read (fols. 494-97):

No further proof was given as to what the other subscribers relied upon in making their investment, nor as to who obtained the other subscribers, except that Wood, who had before testified that he had obtained some of the subscriptions, testifies that he himself procured the following: "H. Carlton, two subscriptions, total, "$8,000; Henry L. Dole, two subscriptions, $5,000; and showed "the reports of these two" (fol. 500). That he also obtained

George C. Howe, $1,000, and James F. West $1,000, and believes these are all, and says: "I could not state any definite statement I "made to them from my recollection at the present time" (fol. 500).

This subscription paper was not filled until after January 1, 1894 (fol. 514).

The $150,000 necessary to be provided by Porter, Hobson and Morse under their individual contract for the purchase of the property from Griffith was provided as follows: Porter, Hobson and Wood, who had apparently then signed this subscription paper for $15,000 each, contributed, in addition thereto, to a pool, $15,000 each, or $90,000 in all (fols. 415, 499 and 535). Egan and Morse borrowed the money at Porter's bank and contributed $25,000, the amount of their subscriptions (fol. 391). The purchasers appear to have been still short of money for their speculation—which they hoped to saddle upon their associates in time—for Porter, who drew two checks aggregating $150,000—one upon his own bank, the Merrimac National, for $90,000, and one on the First National for $60,000, certified on December 22, 1893—admits: "The amount "drawn on my bank, the Merrimac, is $90,000. I did not have "$90,000 on deposit that day. The checks were certified. "I filled my deposit to pay that check before the check "came back, but not until just before, probably; I cannot say ex- "actly" (fols. 534–5).

"These checks were delivered in consummation of the purchase "at Riverside, on December 30, and reached Haverhill on January "6 (fol. 1513). The money was coming in in the meantime" (fol. 535).

Porter further says that he asked the cashier to certify that check, and it was done upon request of himself, and Hobson and Nichols, two of the directors (fol. 535).

Porter attempts to explain this transaction when recalled for that purpose (fol. 709), as follows: "I have testified that some of "the actual cash payments were made after the purchase was com- "pleted in California. For these notes were discounted at the "bank and the money was credited to the 'Certified check ac- "'count.'" But he is only able to name the notes of Wood, Hobson and Morse, and his own, which made up a portion of the $90,000 above mentioned, and Kennedy's. Kennedy's subscription was for $5,000, and is the eighth subscription on the paper, following those above mentioned, and a subscription of Boyd B. Jones of

$10,000 and Charles E. Wiggins of $5,000. Kennedy's subscription is, therefore, the last subscription which is established by the plaintiffs' testimony to have been made prior to the completion of the transaction by the delivery of the deed to Porter, Hobson and Morse from Griffith, and the payment therefor by them, in California on December 30th.

Plaintiffs showed an extraordinary shortness of memory as to the date of the filing of this subscription paper, which date was most material to them to establish their claim that they took the property as trustees of an express trust for the benefit of the subscribers thereto. Wood swears that he obtained the subscriptions of Carlton and Dole, who are among the first subscribers, and says : " I should " say it was before January 1st, I cannot swear to it." And in regard to the subscription of Mr. West, the ninth from the end, says : " I could not give the date of this subscription ; that may have " been, and I think it is, later. There were no names below Mr. " West's when I got his subscription " (fol. 514). The most that plaintiffs can swear to is that the subscriptions were all paid in prior to February 23, 1894.

On December 30, 1893, the contract of sale by Griffith to Porter, Hobson and Morse, and the purchase by Porter, Hobson and Morse from Griffith, was carried out by the delivery of a deed of the property from Griffith to Morse and Egan, representing Porter, Hobson and Morse under a power of attorney executed by them in their individual capacity, appointing Morse and Egan their agents, and by the payment for this property by their agents, with the $150,000 in cash and the mortgage (fols. 274, 368-72). This $150,000 of cash being really the money of Porter, Hobson and Morse, Wood, Egan and Kennedy, and of the Merrimac National Bank, misappropriated by its president, Porter, and one of its directors, Hobson, by overcertification ; so that, at the time of the consummation of this transaction, plaintiffs were not " throughout the transactions herein- " before mentioned acting jointly for their own benefit and for the " benefit of others associated with them in the enterprise." Nor was the contract made with plaintiffs " in their name for their benefit " and that of their said associates jointly interested with them," if by the term " said associates " are intended any others than Egan, Wood and Kennedy, and, possibly, the Merrimac National Bank, whose money had been misappropriated by its officers for the purpose of aiding them in this speculation.

Plaintiffs' counsel substantially admitted at folio 496 that these subscriptions were not all of them made at the time, but that the plaintiffs went ahead and completed the contract, intending to associate with themselves other parties; that in a few days thereafter they did associate other parties. And the plaintiffs' claim is that although these other parties had not actually joined, at the time the transaction was completed and the property purchased by the plaintiffs, the plaintiffs were making the purchase, for the benefit of those who should afterwards join.

This position is not tenable.

After a husband had made an agreement to trade his own property for certain lands, he arranged with his wife that she should take the lands in exchange for certain moneys which he owed her and other moneys belonging to her, and at his request the lands were conveyed directly to her in consummation of the first-mentioned agreement. Held, that the conveyance did not carry with it as pertinent to the lands a cause of action for the deceit of the grantor by which the agreement to trade was induced. The fact that at the time of making the agreement to trade the husband had an intention (not yet disclosed to his wife) to have the lands conveyed to her and take her money instead, and the fact that there had been previous negotiations with the grantor looking to an investment of her money in other similar lands did not render the husband in the making of the agreement to trade an agent for the wife.

Tyson vs. Ranney, 89 Wis., 518.

In the complaint plaintiffs base this claim for right to recover for all the persons who finally purchased from them interests in this property, without introducing proof that such persons were deceived by any one, upon Section 449 of the Code of Civil Procedure. This section is as follows:

"Every action must be prosecuted in the name of the real party "in interest, except that an executor or * * * a trustee of an "express trust, or a person expressly authorized by statute, may "sue without joining with him the person for whose benefit the "action is prosecuted. A person with whom or in whose name "a contract is made for the benefit of another is a trustee of an "express trust within the meaning of this section."

Plaintiffs having proved that their entire investment in this enterprise at the time of the commencement of the suit, after

deducting the portion of it which they had sold, was only $45,000, out of a total of $175,000, or practically one-quarter, might have either sued for fraud practiced upon them, in which suit they would have been charged with the value of the property or the cash which they realized for it, or they might have sued as trustees of an express trust, when they would have been required to show that, at the time of the purchase, there were *cestui que trusts* and who they were; or it may be assumed, for the purpose of this argument, that all the investors might have sued together, or possibly by a committee, but in that case each of them, in order to recover his share, would have been required to prove deceit in his particular case.

Plaintiffs did not adopt the first theory and were not charged with the moneys they realized upon the sale of three-quarters of this property.

Plaintiffs did not adopt the third theory, and no proof of deceit of purchasers of the larger interest in this property was offered. They did adopt the second theory, that they were trustees of an express trust.

The mere words "trustees of an express trust" necessarily imply beneficiaries or *cestuis que trustent existing*.

There is an absolute failure of proof on the part of the plaintiffs that any *cestuis que trustent existed*, as such, at the time of the contract, in respect to which they allege they were deceived.

There was grave error, therefore, in allowing the introduction of the subscription paper as evidence and the refusal of the Court to charge, that the damages must be limited to those suffered by the plaintiffs in this action, and cannot include the damages to other subscribers not proved to have invested on the faith of Egan's endorsement of the Burnham report (fols. 1384–5).

The following summary, based on uncontradicted facts, will show that the exaggerations and misrepresentations, fraudulently made, with a view of inducing the purchase of the mine, were made by Egan, and he was solely responsible for them.

Price: The purchase price of the mine to Sigafus was (fols. 1581, 1584) $230,000.

The fraudulent profit of Morse and Egan, represented by the note to Fillius, secured by the second mortgage, was (fols. 342–5, 393, 565–6, 385, 1537) $108,000.

	What Egan found.	What he reported.
Depth of 1st level	236 ft.	
"		250 ft.
Distance between levels	94	
"		100
Average of bullion returns for July to October, 1893	$15.76	$16.81
Average of assays	$17.44	
		$23.00
Crude ore assay	$31.00	
		$38.00
Number of tons in test-mill run	47	
		25
Produce of test-mill run	$674.87	
		$724.00
Average per ton of test-mill run	$15 to $17	
		$36.97
Ore in reserve and in (fol. 1218) sight.		46,922
Experts on both sides say there is no (fol. 1406, fol. 1410) difference	40,068 tons	19,833
		66,755 tons

	Citation.	What Egan Did.	What All Experts Agree He Should Have Done.
Boards at the south end of the 2d level.	fols. 757–8, 765–7; 783–6;	It appears that, although the rails of the track ran under these boards and there was an opening through them of three or four feet in height from the rails, Egan claims to have made no examination whatever beyond the boards.	He should have gone through the hole, over the track, or had the boards taken down.
Heap of débris at the north end of the 2d level.	fol. 230.	It appears that, although Egan noticed it and was told by Cheatham that the level went some little further, he took no steps to have it removed and made no inquiry with respect to it.	He should have had the pile removed and made an examination.

Stulling and lagging.	It is claimed that Egan made no examination where the walls were supported by stulling and lagging.	He should have made such examination, and in the absence of it was not warranted in making any assumption with respect to the ground behind.

From this uniform exaggeration of what he found, and from his willful omission to look at anything unfavorable, no conclusion is possible, except that his report was willfully false and prepared by him for the purpose of deceiving his customers.

Source and character of the charges of fraud against Sigafus in the testimony.

CHARGE.	EGAN'S RELATION TO IT.
Published the Burnham report.	Egan says he verified it. If he did, he could not but have noticed its many inaccuracies and inconsistencies. It is Egan who vouches as to the correctness of the Burnham report to the plaintiffs, and no one else; and it is through Egan only that any connection is made with the defendant.
Concealed the two ends.	Egan was bound to look behind the boards and the heap of debris, which were in themselves notice to him that there was something behind them. There was no deceit of the plaintiffs with respect to this, except through Egan; and the sole proof that Egan was deceived with respect to it is his negative testimony that the defendant omitted to tell him.
Falsified the mill run.	It was Egan's mill run. With respect to its amount, Egan states the number of skips, admits he knew how much the skip held—from which it was a mere question of multiplication for him as a mining expert to know exactly the number of tons, and that instead of being 25, there were 47. This error alone would reduce the figures from $36 to $17 per ton.

Carried the stopes to an irregular height, so as to expose only the widest portion of the vein.

Egan examined it. He says he measured it on all sides; on the floors of the levels, which were necessarily horizontal; on the sides of the raises and shafts, which were necessarily straight; and in the backs of the stopes, which were undoubtedly irregular.

The only way in which the plaintiffs were deceived with respect to this was through Egan; and the only proof that Egan was deceived is his own statement.

It appears, then, that Egan made a false report, and willfully exaggerated the value of the Good Hope Mine; that the plaintiffs purchased upon the faith of this report alone; and that it is only through Egan that there is any proof or suggestion of proof of deceit of plaintiffs by the defendant.

For all the foregoing reasons the judgment and verdict in this action should be set aside and a new trial ordered.

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Brief of Stickney for D. C.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 259.

Filed April 21, 1899.

JAMES M. SIGAFUS,

Plaintiff in Error,

against

DUDLEY PORTER *et al.*,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

ALBERT STICKNEY,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 259.

JAMES M. SIGAFUS,
Plaintiff in Error,

VERSUS

DUDLEY PORTER *et al.*,
Defendants in Error.

Brief for Defendants in Error on certificate from the United States Circuit Court of Appeals for the Second Circuit.

The question to be decided is, whether the measure of damages, in a common law action for deceit, on a sale of land, is the difference between the actual value of the land and the consideration paid, with other outlay attributable to defendant's fraud, or the difference between the actual value and the value as represented.

The facts, as stated in the record, are as follows:

"The action is one to recover damages for deceit by defendant inducing the purchase of a gold mine (real

estate, *improvements, plant,* and mining rights) by the plaintiffs. There was evidence tending to show and the jury found that by false *representations and* fraudulent *devices* defendant misled plaintiffs as to the *history, condition* and *value* of the mine; that defendant knew the falsity of such representations; that they were material; that plaintiffs relied upon them in good faith, and were induced thereby to make the purchase, which they would not have made except for such false representations and fraudulent devices. There was conflicting evidence, but *sufficient proof to enable the jury to determine* as to what would have been *the value of the mine* had it been such as defendant *represented* it to be. There was conflicting evidence, but *sufficient proof to enable the jury to determine* as to what was *in fact the value of the mine* on the day the purchase was consummated and the property transferred. There was no conflict of evidence as to what was paid for the mine nor as to what was laid out upon it by plaintiffs after purchase in order to develop it."

The record shows, therefore, that the "false representations and fraudulent devices" established in this case concerned, not mere matters of estimate, or opinion, but facts. The record also shows, that the evidence before the jury was such as to "enable them to determine" both the "actual value" of the property, and its value as "represented,"—"on the day the purchase was consummated and the property transferred."

Our entire contention, moreover, is, that the true measure of damages is the difference between these two values—*both taken on the same date.* This feature of the position has been studiously ignored by our opponents, throughout their entire argument. It was necessary, that they should ignore it.

Until the decision of *Smith* v. *Bolles,* 132 U. S., 125, the rule, that the measure of damages in such a case is the difference between the actual value and the value as represented, was established by an overwhelming volume of authority. It was not open to controversy.

We respectfully submit, that the old established rule is the only one which rests on sound reason, and that the Court, in the decision of *Smith* v. *Bolles,* had no intention of abolishing that old established rule.

We submit the following positions:

I.—Until the decision of *Smith* v. *Bolles,* the rule, that the measure of damages is the difference between the actual value and the value as represented, was established by an overwhelming volume of authority.

1. The rule, and its reason, are stated in the following opinions of the Massachusetts Supreme Court, the New York Court of Appeals, and the Supreme Court of Kansas.

Morse v. *Hutchins,* 102 Mass., 439. Tort for deceit, GRAY, J. "The rule of damages was rightly stated to the jury. It is *now well settled* that, in actions for *deceit or breach of warranty,* the measure of damages is the *difference* between the *actual value* of the property at the time of the purchase, and its *value if the property had been what it was represented or warranted* to be. (Citing Stiles *v.* White, 11 Met., 356. Tuttle *v.* Brown, 4 Gray, 457. Whitmore *v.* South Boston Iron Co., 2 Allen, 52. Fisk *v.* Hicks, 11 Foster (N. H.), 535. Woodward *v.* Thacher, 21 Verm., 580. Muller *v.* Eno, 4 Kernan, 597. Sherwood *v.* Sutton, 5 Mason, 1. Loder *v.* Kekule, 3 C. B. (N. S.), 128. Dingle *v.* Hare, 7 C. B. (N. S.), 145. Jones *v.* Just, Law Rep., 3 Q. B., 197.) *This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him.* To allow to the plaintiff (as the learned counsel for the plaintiff argued in this case) *only the*

difference between the *real value* of the property *and* the *price* which he was induced to pay for it, would be to make any *advantage* lawfully secured to the innocent purchaser in the original bargain *inure to the benefit of the wrongdoer;* and in proportion as the original price was low, would afford a *protection to the party who had broken,* at the *expense of the party who was ready to abide by the terms of the contract.* The fact that the property sold was of such a character as to make it *difficult to ascertain with exactness* what its *value* would have been *if it had conformed to the contract* affords no reason for exempting the defendant from any part of the direct consequences of his fraud. And the *value may be estimated as easily in this action as in an action against him for an entire refusal to perform his contract."*

Krumm v. *Beach,* 96 N. Y., 398, which was an action for deceit on a sale of land:

"The measure of damages in such a case is *full indemnity to the injured party;* the entire amount of his *loss* occasioned *by the fraud.* (*Dimmick* v. *Lockwood, 10 Wend., 105; Wardell* v. *Fosdick, 13 Johns., 325, and, Whitney* v. *Allaire, 1 Comst., 305-6.*) The first of these cases plainly points out the *difference* between actions for a *breach of covenant* and those founded upon *fraud.* In the *former* the *damages* are always bounded by the *consideration* and interest, which *often fall short of full indemnity;* a rule said to be founded "upon considerations of public policy without reference to the actual damage sustained by the party." (*Whitney* v. *Allaire, supra*); but where *fraud* is established, *full and complete indemnity* is awarded. That full indemnity *may go beyond the consideration paid.* The purchaser of land, as of other property, has a right to make a good bargain if he can, provided only that he deals honestly. Often *the profit secured above the price paid is the sole motive for the purchase,* and where there is an exchange of lands to some extent,

one dealing fairly may sell his own at a high price and secure another's at a low one. To the *entire benefit of his bargain he is entitled.* If there has been no fraud he would have had it; he *should not lose it because the other party had been dishonest.* The measure of damages, therefore, should be that adopted by the Court below; the *difference in value between the property conveyed and that which would have been conveyed had the property been as represented,* and the actual contract honestly fulfilled."

Tracy v. *Gunn,* 29 Kansas, 508, (1883). Action by vendee against vendor for damages for deceit on a total failure of title. The Court say, per Mr. Justice BREWER: "The second question is as to the measure of damages. Plaintiff in error claims that it was only *the price paid and interest,* while the Court admitted testimony as to the value of the property at the time of the deed, and rendered judgment for such value. * * * In breaches of contract to convey real estate, a peculiar distinction as to the measure of damages runs though the cases, and that founded upon the motive with which the vendor acts. If he acts in *good faith,* it is held that the *contract price* becomes the measure of damages, while if he acts *mala fide,* the vendee may recover the actual damages." The learned Justice then quotes and approves Field on Damages, § 485; Sedgwick on Damages, p. 209, to the effect that in such a case the vendee is entitled to damages for the "*loss of his bargain,*" and continues:

"It is enough for us to say that the doctrine seems to be clearly established, that it is founded on justice, and that it is in harmony with the general rules of the law which aims to give to a party all the damages which he has actually sustained."

2. The universality of the acceptance of the rule is shown by the following line of authorities:

Whitney v. *Allaire,* 1 N. Y., 305, 312.
Miller v. *Barber,* 66 N. Y., 558.

Hubbell v. *Meigs,* 50 N. Y., 480, 491.
Pryor v. *Foster,* 130 N. Y., 171, 178.
Pierce v. *Tiersch,* 40 Ohio St., 168, 173 (1883).
Lunn v. *Shermer,* 93 N. C., 164, 170 (1885).
Shinnabarger v. *Shelton,* 41 Mo. App., 147, p. 157, 1890.
Gunther v. *Ullrich,* 52 N. W. Rep., 88 (Wis. Supm. Ct., 1892).
Wright v. *Roach,* 57 Maine, 600 (1870).
Williams v. *McFadden,* 23 Fla., 143, 149 (1887).
Herfort v. *Cramer,* 7 Col., 483, 491, 1884.
Foster v. *Kennedy's Admr.,* 38 Ala., 359, 1862.
Budlong v. *Cunningham,* 11 Ill. App., 28, 32.
Johnston v. *Beeney,* 5 Ill. App., 604.
S. C., 9 Ill. App., 64.
Antle v. *Sexton,* 32 Ill. App., 437, 440.
S. C., 137 Ill., 410, 415.
Drew v. *Beall,* 62 Ill., 164, 168.
Stiles v. *White,* 11 Met., 356.
Harvey v. *Hadley,* 87 Cal., 557.
Murray v. *Jennings,* 42 Conn., 12.
Miller v. *Barber,* 66 N. Y., 558.
Thompson v. *Burgey,* 36 Pa. St., 403.
Stetson v. *Croskey,* 52 Pa. St., 230.
Bowman v. *Parker,* 40 Vermont, 410, 413-414.
Noyes v. *Blodgett,* 58 N. H., 502.
Gates v. *Reynolds,* 13 Iowa, 1.
Molberly v. *Alexander,* 19 Iowa., 162.
White v. *Smith,* 54 Iowa, 233.
Page v. *Wells,* 37 Mich., 415, 421.
Jackson v. *Armstrong,* 50 Mich., 65, 69.
Stockham v. *Cheney,* 62 Mich., 10, 14.
Campbell v. *Hillman.* 15 B. Monroe, 508 (Kentucky).
Estell v. *Myers,* 56 Mississippi, 800, 805-806.

Young v. *Filley,* 19 Nebraska, 543.
Long v. *Clapp,* 15 Neb., 417, 420.
Ansyln v. *Frank,* 8 Missouri App., 242, 248.
Tracey v. *Gunn,* 29 Kansas, 508.

3. The following were cases of warranty where the same rule of damages was applied:

Clare v. *Maynard,* 7 C. & P., 741.
Walker v. *France,* 112 Pa. St., 203, 211.
Seigworth v. *Leffel,* 76 Pa. St., 476.
Jones v. *Just,* L. R., 3 Q. B., 197, 200-201.
Callanan v. *Brown & Co.,* 31 Iowa, 333 (341).
Maxted v. *Fowler,* 94 Mich., 106.
Tuttle v. *Brown,* 4 Gray (Mass.), 457.
Whitmore v. *So. Boston Iron Co.,* 2 Allen (Mass.), 52, 60.
Peterkin v. *Martin,* 30 Louisiana Ann., 894.
Foster v. *Baer,* 7 Louisiana Ann., 613.
Slaughter v. *McRae,* 3 Louisiana Ann., 455.

4. So far as we are aware, down to the decision of *Smith* v. *Bolles,* not one well considered opinion can be found, coming from any court of authority, where there has been, in the language of Mr. Justice CURTIS, in *Carroll* v. *Carroll's Lessee,* 16 Howard, 275, "an application of the judicial mind to the precise question," where this established rule has been so much as called in question.

Peek v. *Derry,* Law Rep., 37 Chanc. Div., 541, on which the defense so strongly depended on the argument in the court below, as establishing a different rule in England, is not at variance with the established rule. An examination of the record in that case shows that, on the hearing below the action was dismissed, and, consequently, the question of damages was there neither argued nor considered. On the appeal, too, the questions which were the subject of the main discussion by counsel concerned only the right of the

plaintiff to any recovery whatever. *Prior to the rendering of the opinion of the Appellate Court, the arguments of counsel on the appeal made no allusion to the rule of damages.* But Lord Justice Cotton, in reversing the decision below, added, at the end of his opinion, a paragraph on the question of damages. In that paragraph he said that the plaintiff would be entitled to recover "the difference between the sum given for the shares and the value of the shares." Evidently, that opinion went on the assumption, that the "sum given" was—in that case—equal to the value represented; and, consequently, a recovery on that basis—in that case—would, in substance and effect, conform to the established rule.

Thereafter (p. 590) the question of damages was argued. But the only point of substantial controversy on the later argument was, not as to the measure of damages, but the date, at which the measure should be applied.

Thereupon the Court said (p. 591): "One rather difficult point was *omitted in the argument.* * * * It is one of considerable difficulty. The question which arose was this: There *being no evidence which would really fix the loss,* we thought there ought to be an inquiry; but the *question was to what period ought that inquiry to refer?*"

That was really the only point considered, and decided, in *Peek* v. *Derry.*

Obviously that case, like many others, was one where the special facts led both counsel and Court to ignore the general rule. And it is quite obvious, that neither Court nor counsel had any intention of questioning the established rule.

There are many such cases. Many cases, then, can be cited, where, for one or another reason, the well established general rule has been inapplicable, or has not been invoked.

But we find *no well considered case,* where the rule, when invoked, and when applicable, has been denied, or even questioned.

II.—At the outset, it is necessary to call to the attention of the Court the well established fundamental distinction, between the two opposite remedies in the case of fraudulent representations; the one being that of rescission, usually asserted in a court of equity, which proceeds on a disaffirmance of the contract, and entitles the purchaser to recover the consideration paid —as such; the other being the right to damages in a common law action of deceit, which proceeds on an affirmance of the contract, and entitles the purchaser to recover the damages caused by the false representations; which is the difference between the actual value and the value represented.

Yeomans v. *Bell,* 151 N. Y., 230.
Bradley v. *Bosley,* 1 Barb. Ch., 125, a decision by Chancellor Walworth.
Krumm v. *Beach,* 96 N. Y., 398.
Gould v. *Cayuga Bank,* 86 N. Y., 75.
S. C., 99 N. Y., 333.

The disregard of this distinction, a distinction which no well considered authority denies, has been the source of nearly all the doubts and discrepancies in the statement of the rule of damages in actions of deceit. Indeed, it is submitted with all possible deference, that it was the disregard of this distinction, which led the Court in *Smith* v. *Bolles* to make some unnecessary statements, which are at variance with the mass of authority already cited. The right, in a case of false representations, to recover the money consideration paid—as such—rests only on the right of rescission. No doubt, there will at times be a case, where a purchase had been made of property which was absolutely worthless, where it will happen,

that the money paid is, in that particular case, equal to the damage from the deceit. In such cases, however, the money consideration merely happens to be the equivalent of the damage, for the reason, that it happens to be equal to the value as represented; and is, therefore, the equivalent of the difference between the represented value, and zero—which is the actual value. Nevertheless the law still is, that the money consideration—as money consideration—can be recovered only on the basis of recission. It cannot, therefore, ordinarily, be recovered in an action for deceit. For that action, as before stated, rests on an affirmance.

In some cases, too, confusion may have arisen from the circumstance that the contract price is admissible *as evidence,* of the value of the thing as it is represented. That it is evidence, but not conclusive evidence, on that point, is laid down in several cases, which nevertheless affirm the rule for which we contend.

Carr v. *Moore,* 41 N. H., 131.
Estell v. *Myers,* 56 Miss., 800.
Lunn v. *Shermer,* 93 N. C., 164.

So it has often happened, in cases where the distinction was not clearly brought out, that the contract price and the represented value have been used as convertible terms. Such a case was

Sherwood v. *Sutton,* 5 Mason, 1,

of which the headnote states the rule of damages precisely as we are here contending for it; while from the opinion of Mr. Justice STORY it might seem that the contract price was the basis of the estimate of damages which he there allowed. Of the same class was the case of

Weybrick & Co. v. *Harris,* 31 Kansas, 92,

in which the opinion of the Court by Mr. Justice BREWER states the rule in both forms. It is perfectly apparent however that the learned Justice did not in-

tend to sanction any departure from the established rule, which he stated as follows:

"If the vendor knows nothing of the contracts made by the vendee or the specific purpose for which the property is intended, and knows simply that the purchaser is seeking for an article of the kind and quality named, his liability is limited to the *difference between the value of the article actually delivered and that of the article which the parties intended to purchase and contract for.*"

III.—The rule so established is the only one which rests on sound reason, which will work out justice, and place the entire transaction, including the question of damages, on the basis contemplated by the parties themselves.

That has been the view of the jurists who have decided the long line of cases above cited.

But that view will be seen to be essentially reasonable, and the only one that is reasonable.

1. The rule in actions for deceit should be, at least, as favorable to the party injured, as in cases of warranty.

In the case of a mere contract of warranty, made honestly, where property sold is warranted—to be of a certain quality, the rule is uncontroverted; the measure of damages, on a breach of such a contract, is the difference between the actual value of the property received, and the value of the property as warranted. In other words, the defendant is compelled to make good his statements. That is the case, where the misrepresentation has been honestly made, as matter of contract.

In cases of deceit, where the ground of the liability

is a representation wilfully false, made for the express purpose of deceit and fraud, the rule should not be more favorable to the wrongdoer, than it is to the party who merely honestly makes a contract, which he afterwards fails to perform.

2. The established rule is the only one which will carry into effect the controlling principle, as it is stated by our learned opponents, by all the authorities, and in *Smith* v. *Bolles;* that is, that the recovery is to be of "such damages as naturally and proximately resulted from the fraud;" or "the natural and necessary result of the false representations."

Brief of plaintiff in error, pp. 3 & 8.

We accept, without hesitation, these statements of the principle underlying the rule.

Let us now see how the principle can be worked out in practice.

In cases of rescission, where the purchased property is returned, there is, no doubt, the logical legal basis for a recovery of the money paid—as such.

In actions for deceit, however, where the property purchased is retained, where, consequently, the damage must be limited to the loss caused by the deceit, it is easily seen, that the money paid, as such, affords no criterion of the resulting damage. Take a simple case, the purchase of a farm, represented, among other things, to contain two hundred acres of rich intervale; in fact, containing only one hundred acres of such land. The fraud proved is only the misrepresentation of that one fact. The damage recoverable could legally be based on only that one misrepresentation. Although a rescission would entitle the purchaser to recover the entire consideration, yet his common law action of deceit, based on a retention of the property, would, very clearly, entitle him only to the difference in value between a farm containing two hundred acres, and one containing one hundred acres, of intervale; in other words, to

the difference between the actual value and the value as represented.

So, too, in the case of a farm for raising gold, commonly called a gold mine. Take the case, where the vendor has falsely represented, that the ore in the mine lies in a continuous unbroken vein, running a certain number of ounces of gold to the ton, with a certain number of tons of ore of a particular grade actually "in sight"; the fact being, that the vendor has for years been working the mine, so as to leave considerable stretches of the richest ore exposed to sight, and has filled up long spaces of the vein which were completely barren, so that they could not be discovered on any ordinary examination. Suppose, in such a case, that the purchaser, after his purchase, has taken out large quantities of poor ore and worthless dirt, in a fruitless search for ore that will pay. A return of the property in its original condition, in other words rescission, has been made impossible, by the very action which the vendor intended, the removal of large amounts of ore by the purchaser.

In such a case, what rule can possibly be devised, other than the old established one, to fix the damage "proximately resulting" from the deceit? The consideration paid, together with the money spent in development, may be very large. The difference, however, between the actual value of the property and its value upon such representations as a jury finds were false, may be very slight. In a few exceptional cases, it may be possible to recover money spent in the search for the ore falsely stated to have been in the mine. But, in the general run of cases, can it be reasonably contended, that the purchaser can recover his money expenditure—in an action for deceit? No doubt, the fraud perpetrated gave him his other right—that of rescission; and, if a rescission were still possible, he would be entitled, on a rescission, to recover the consideration paid—as such. In the action for deceit, however, his right is only to the above stated difference.

3. Careful consideration will show, moreover, that the established rule is the only one that will effectuate the intention of the parties to the transaction, as expressed by themselves, and that any other will put the transaction on a basis which the parties themselves never contemplated.

Assume a case where, on the representations made, the value of the property sold as represented is twenty-five thousand dollars. But its actual value is only fifteen thousand. For their own good reasons, the parties make a sale at fifteen thousand. In other words, the price paid happens to be precisely equal to the real value. The purchaser believes the representations; in other words, he believes the value to be twenty-five thousand dollars. Such is the statement of the seller, on which the purchaser relies, and on which the seller intends him to rely. In other words, the seller intends the purchaser to believe, that he is getting a property worth twenty-five thousand dollars at the price of fifteen thousand. The purchaser makes the purchase by reason of that belief; and the belief is caused by the wilful fraud of the seller. The transaction intended by the parties goes on the very basis, that the purchaser is to have a profit of ten thousand dollars. That is the result intended, by the transaction as expressed by them.

Under the rule for which our opponents contend, there can be no recovery whatever, because the consideration paid is no more than the actual value. In other words, the buyer must lose his profit of ten thousand dollars, to which he was entitled under the transaction, as expressed, and intended, by both parties.

The buyer, in such a case, is justly entitled to the value, which he believed he was getting; that belief being created by the seller, who knew the real facts, and produced the belief by the perpetration of a wilful fraud. The seller is justly condemned to make good to the buyer the value which he stated to the buyer, falsely, with the intent to deceive, which constituted the very basis of the transaction.

The precise fraud, intended by the guilty party, was the sale of a property actually worth only fifteen thousand dollars, on the belief of the purchaser, that he was getting a property worth twenty-five thousand dollars. No rule can be devised, which will work justice, in that case, or in any case of wilful deceit, except the rule that the guilty party shall be compelled to make good his statements. On the other hand, the rule for which our opponents contend, necessarily has for its result the protection of the party committing the fraud, and the protection of the precise fraud, which the guilty party intended.

4. If it be said, that the result of the old established rule is to give the purchaser prospective profits, the answer is, that such is the intention of the parties to the transaction.

The seller says, in effect, "I am selling you a property worth twenty-five thousand dollars, at such a price as will ensure you a profit of ten thousand." That is the precise inducement, held out to the purchaser, on the basis of which he makes the uprchase. That precise profit is exactly what the transaction—as expressed between the parties—gives him. No other rule will effectuate the transaction on the basis contemplated, and intended, by the parties.

We accept unhesitatingly the rule as quoted in *Smith* v. *Bolles* by the learned Chief Justice from *Crater* v. *Binninger*, 33 N. J. L., 513, that "the test is that those results are proximate which the *wrongdoer from his position must have contemplated* as the probable *consequence of his fraud* or breach of contract."

In the case supposed the "result which the wrongdoer from his position must have contemplated" is the loss of that profit—of ten thousand dollars. That is the precise loss "contemplated," by the party committing the fraud, as the consequence of his fraud. He intends that precise damage. Both buyer and seller intend the transaction to go on the basis of value represented. That

being so, we respectfully submit, that a court has no option, but to enforce the transaction on the basis intended by the parties. When the parties both intend a sale at a price less than the value as stated by the seller, the courts have no right—to put the transaction on any other basis than the one on which it is placed by the parties themselves.

It is wholly inaccurate, to apply the term "speculative," in its commercial sense, to the plaintiff's recovery under the established rule. A "speculation," in that sense, involves the purchase of property with a view to its advance in value at a future day. Under the established rule of damages, the comparison of the two values —"represented" and "actual"—is to be made as of the same point of time, the date of the sale. The plaintiff's recovery is for the difference between the two at that date.

Nor does the established rule involve any question of future prices on the "market." The rule for which we contend, has no concern with "market" value—as such—, but only with "actual" value.

5. The contention of the defendant, that the established rule allows "contingent," or "speculative" profits, has no sound foundation.

The recovery, under the rule, it must be repeated, is of the difference between actual value and represented value, both taken on the same date.

The false statements submitted to the jury, in every such case, concern only matters of fact. So the certificate in this record states as to this case. If a man falsely represents, that a certain gold mine has actually "insight," as the experts use the phrase, a certain number of tons of ore, running a certain number of ounces of gold to the ton, how is it possible, that there can be anything more thoroughly in the nature of a statement of fact? If, thereafter, it appears that, by what may be termed mineral forgery, he has made an accurate examination of the mine impos-

sible, and has thus deceived his vendee by his false statements of mere quantities, of mere figures, how is it possible more completely to exclude from the jury's computation of damages the element of the "contingent," or the "speculative," than by the rule, that the damage resulting from the deceit is the difference, between the value on the false statement, and the value on the fact? How is it possible, to "make the punishment fit the crime" with greater accuracy?

A jury "speculates" no more under this rule, than it is compelled to do in any case involving the question of the value of land; or, indeed, than it does in many cases of a valuation of personal property; or in cases of many kinds, which are decided on the opinions of experts.

It is precisely as easy, moreover, for a jury to estimate represented value, as actual value. Both are estimated, by experts, *on facts assumed*—which is merely one method of description. In estimating actual value, so-called, the land is described—by witnesses; then, on those facts assumed, that is, on that description, experts give their opinions; and, on those facts assumed, with the opinions, the jury forms its conclusion. In estimating represented value, the case is submitted in precisely the same way, on facts assumed; that is, on a description, of the same kind as that used in submitting the question of actual value, (the facts assumed being the facts falsely represented); the experts thereupon give their opinions on *that* description; and the jury thereupon form their conclusion as to *that* value. The method is precisely the same in both cases. The one involves just as much speculation, and conjecture, as the other. And no more.

Our opponents are compelled, by the necessities of their situation, to make an assault on the established general rule, under cover of an insinuation as to the character of the property purchased in this particular case.

It is quite evident, that the character of the purchased property, in any particular case, has no logical, or legal,

connection with the general rule of damages for all cases. Even if, therefore, it were the fact, that the purchase in this particular case had been of a property more or less "speculative," that fact would have no bearing whatever on the general rule of damages, either as to its principle, or its statement.

As matter of fact, however, a gold mine, if developed honestly, and sold honestly, is a property more free from the element of "speculation," than property of almost any other class, real or personal. The reason of that fact is to be found in the nature of its product, which is not only itself a thing of value, but has been long selected by all civilized peoples as the standard of all values, because of its own stability of value. No doubt, there is in the purchase of a gold mine, the element of the uncertain, of the "contingent." But that can be said of many purchases, of the purchase of a number of city lots, or of a large tract of farming land, or of a ranch. They are all more or less "speculative." City lots, especially, have for years been the sport of the speculator. City lots depend, for their value, on probable future uses, to be made of the lots themselves, and of other properties in their neighborhood. Farming land depends, for its value, on the future crops that can be raised from it. A ranch depends, for its value, on the cattle, or sheep, or horses, that can be raised from it. A gold mine, on the amount of gold which can be raised from it. But a gold mine that has been developed honestly, and is sold honestly, may easily be less "speculative," as a purchase, than city lots, or a large farm, or a ranch. Skilful experts, where the ore is exposed with honesty, can measure the exposed surfaces, can assay the ore specimens, and can make estimates of the metal to be extracted, with much greater accuracy than is possible as to the future profits of city lots, or the future crops of a farm, or the future profits of a ranch. The reason is, that a developed mine has fewer contingencies than almost any other kind of real estate. Especially, it is free from the

contingencies of the seasons. To skillful mining experts, it is simply a mathemathical problem, an engineering problem, susceptible, in the hands of competent men, of the same accuracy with other engineering problems. All these purchases are "speculative."

If, therefore, we should assume, that the purchase of this gold mine was, to some extent, "speculative," the question still remains, what was the reasonable rule, the best rule practicable, under which a jury should make its estimate of the damage resulting from a wilful deceit, as to *matters of fact*. For, of course, misrepresentations as to matters of opinion were not submitted to the jury.

The record in this case, moreover, is, that there was "sufficient proof to enable the jury to determine," both the "represented" value, and the "actual" value—as matters of fact.

It may be conceded, that the established rule allows a jury some latitude of estimate. But that constitutes no valid objection to the rule. That latitude is unavoidable. That possibility exists in many cases, in every case of valuation of land, in cases of damages for loss of time, damages to the person, to the feelings, injuries to real estate, and cases of many other classes. The rule in actions of deceit is no more difficult of application than in many others.

6. Nor does the contention of the defendant below, that the rule gives no credit or allowance to the defendant for the value of the property purchased, rest on good grounds.

On the contrary, the rule does precisely that; it does make an allowance to the defendant for the real value, when it directs the jury to assess damages at the difference between the real value and the value as represented. The fact that the rule makes that allowance constitutes one of the chief reasons on which the rule rests.

On the other hand, the rule which allows a recovery only of the money paid, is open to this very objection,

that it gives no consideration whatever to value, either to the value in fact, or the value as represented. It simply allows a purchaser to rescind. It does not rest upon the basis of awarding the actual damage caused by the deceit proved. It simply gives to the purchaser the right to abrogate the entire transaction. In other words, it allows, to a party who has been deceived by false statements, his other remedy—rescission. In short, it is in cases of rescission, and only in cases of rescission, that the purchaser has the right to recover the money consideration paid—as such.

7. The established rule works out justice to both parties, as perfectly as is possible.

The contract of sale stands. The plaintiff retains the purchased property. The defendant retains the purchase price. The defendant is then credited with the actual value, and is required simply to make good his false and fraudulent representations, by paying to the plaintiff the difference between the actual value and the value represented.

Especially in cases, where the deceit alleged is complex, as was the fact in the case at bar, where it was a combination of representations and acts, of acts which made the verification of the representations impossible, it is quite apparent that the established rule is the only one practicable, for the reason that the fraudulent acts charged may not all be found by the jury; and it is only for such as the jury find to be established on the evidence, that damages can be allowed. It is obvious, that to allow in all such cases a recovery of the money paid would be quite contrary to the principle which constitutes the foundation of the rule.

These considerations are the ones which have led the ablest jurists in England and the United States, to establish, and adhere to, the same rule in cases of deceit, which they all follow in cases of warranty, unless the intention was to lay down a wholly different rule in *Smith* v. *Bolles*.

IV.—The Court, in *Smith* v. *Bolles,* had no intention of departing from the established rule.

A careful examination of the record, with the authorities cited, will show that the Court only intended in that case to deny the right to remote and doubtful possible profits, which could not reasonably have been contemplated by the parties.

1. The opinion is of course to be read after the method recently laid down by the Court itself in *Pollock* v. *Farmers' Loan and Trust Company,* 157 U. S., 429, by Mr. Chief Justice Fuller (at p. 574).

"Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect to *decisions directly upon the points in issue.*

"The language of Chief Justice Marshall, in *Cohen* v. *Virginia,* 6 Wheat., 264, 399, may profitably again be quoted: 'It is a maxim not to be disregarded, that *general expressions,* in every opinion, are to be taken *in connection with the case* in which those expressions are used. If they *go beyond the case,* they may be respected, but *ought not to control* the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. *Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.*"

2. The opinion, throughout, makes not so much as an intimation, of any intention to depart from the long line of authorities which have been cited, or of the fact that there were any authorities at variance with the

language in the opinion; or of any intention to state any principle, or rule, that was new.

The learned Chief Justice, who wrote the opinion, made no reference to the unbroken line of authorities in Illinois. Mr. Justice Blatchford concurred in the opinion, making no reference to the unbroken line of authorities in New York. Mr. Justice Gray, who, as Chief Justice of the Massachusetts Supreme Court, had written the opinion in *Morse* v. *Hutchins* above quoted, concurred, and made no reference to the unbroken line of authorities in Massachusetts.

So that it is quite inconceivable, that either the learned Chief Justice, or either of those Associate Justices, or any other member of the Court, could have had any intention of departing from the old established landmarks, in this branch of the law.

There are, no doubt, many cases, to which the rule can have no application. Such were the cases cited by the learned Chief Justice in the opinion.

One was a case, where the plaintiff was not a purchaser of the entire property, as to which the false representations were made, but had acquired only a fractional interest in a speculative venture, on a false representation as to the price which the seller had originally paid for the entire property. Another case held, merely that the plaintiff could not recover "purely speculative benefits." Another was the case of misrepresentations as to the value of land, on which the plaintiff had made a loan; and his damages were limited to the loss on his loan. Another held, that a party, who was induced by fraud to enter a firm, and pay certain firm notes, could recover only the amounts he was compelled to pay.

Stated more in detail, those cases are as follows:

Crater v. *Binninger,* 33 N. J. Law, 513, decided only that there was error in the charge in that case, and that the established rule was not applicable to the facts of that case.

In *Crater* v. *Binninger* the plaintiff was induced to enter into an oil land speculation by the representation

of the defendant that the land cost $28,000. $4,000 was required for a working capital, and the defendant purchased an eighth for $4,000. He afterwards paid an assessment of $500 for the purpose of furnishing additional capital. A portion of the property was sold for $16,000. The actual cost of the property to the defendant was $18,000. The Court below ruled that the plaintiff was entitled to recover the difference between his investment ($4,500) and the actual cost of the same to the defendant ($2,000) viz., $2,500 *without taking into account the value of the land remaining unsold.* The defendant contended that the measure of damages was one-eighth of the real difference between the "cost" and the represented cost (not including the $500); and on appeal it was decided that the damages arising from a false representation are not necessarily limited to the difference between the actual value and the represented value in all cases. In the opinion of the Chancellor, on page 522, it is stated that the difference between the actual value and the represented value is in many cases the measure of damages; and *Stiles* v. *White,* 11 Met., 356, and *Cary* v. *Gruman,* 4 Hill, 627, are cited by the Court with approval. In each of the two last named cases the measure of damages was held to be the difference between the actual value and the value as represented. In *Crater* v. *Binninger* the Court lays stress upon the fact that the plaintiff was *not a purchaser of the property,* but was induced by the representation in question to embark in a speculative enterprise, which would naturally result in further investment and loss.

Fitzsimmons v. *Chapman,* 37 Michigan, 139, decided only that "damages are not recoverable for the loss of *purely speculative benefits* that cannot be estimated by any certain standard."

Here, again, we come upon the real point, on which the Chief Justice was really laying stress, that of possible prospective profits.

That the Michigan Supreme Court did not intend in

that case to depart from the established rule in actions of deceit is clear from the fact that in the same volume of its reports we find the following statement of the rule by Judge COOLEY in the case of *Page* v. *Wells*, 37 Mich., 415: "If the plaintiff was induced to purchase lands on representations which proved to be untrue, the measure of his loss, as it seems to us, would be perfectly plain, and would be reached by an answer to the following question: *How much less is the land worth as it is, than it would have been if its condition and quality had been as represented? This is the only safe and only reasonable rule.*"

Horne v. *Walton*, 117 Illinois, 130, was a case where the rule was clearly inapplicable, as the misrepresentation was as to the value of land on which the plaintiff had made a loan. The recovery was properly limited to the amount lost on the loan. The plaintiff was not a purchaser of the land. The Court in that case, at page 134, expressly recognize the soundness of the established rule. But they say, "this instruction was properly refused, as being *inapplicable to the facts of the case.* Where there has been a *sale* of land, and fraudulent representations have been made as to its value or quality or condition, the measure of damages is, *undoubtedly*, the *difference* between the *actual value* of the land and the *value* of *it*, as it was *represented* to be at the time of the sale. In this case there was *no sale*, but a *loan.*"

When examined more closely it will be seen that the rule there laid down is really the same which we are contending for. In other words, what a lender of money intends is the certainty of getting back his money, that is security for his loan. He can never get more than the amount of his loan. From that fact alone, the represented value of that which he receives is fixed. In this respect, the position of the purchaser of lands is quite different, because he is entitled to the land's entire

value. But the measure of damages in an action of deceit is the same in both cases. This is brought out clearly in the opinion of Judge COOLEY in a precisely similar case, the case of a loan on inadequate security, induced by fraudulent representations as to the value of the security. The damages were held to be the difference between the loan and the actual value of the security.

Briggs v. *Brushaber*, 43 Mich., 330.

Judge COOLEY there says: "In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was marketable commodity, and she lost by the fraud itself the *difference* between the market *value* of that which she *received* and that *which she was to have under the arrangement.*"

Schwabacher v. *Riddle*, 84 Illinois, 517, merely holds, that one who has been induced by fraud to become a member of a firm, and is thereafter compelled to pay a proportion of certain firm notes, can recover only the damage resulting from the fraud. No other point was raised, or decided. That, too, was not the case of a purchase of property. The Court say: "So much of the loss as was sustained in consequence of the misplaced confidence in Fosbender's solvency alone, is most clearly not chargeable to the other parties. If appellee is entitled to recover, it is for the injury done him by the defendants, and not for injuries sustained in consequence of circumstances over which they had no control."

Slingerland v. *Bennett*, 66 N. Y., 611, decided only that in any action for breach of warranty as to the responsibility of the maker of a note given to plaintiff on a sale of a horse, the plaintiff could not recover the costs of a judgment on the note, but only the amount

of the note with interest. Not so much as an allusion is made to the established rule on sales.

It is apparent, therefore, that not one of the authorities cited by the Chief Justice questions the established rule, that several of them expressly assert it, and that they all go virtually on some other question, of what was or was not damage resulting from the fraud in that particular case.

3. The decision in *Smith* v. *Bolles,* rightly interpreted, must be held to be a decision, only that the measure of damages is not the difference between the represented value and the contract price.

At the same time, the opinion states the established law, that there is no right, in such a case, to recover remote possible prospective profits.

The position taken by the plaintiff in error in that case, as appears from his brief in the record, was as follows:

"The Court charged the jury that the measure of recovery is generally the difference between 'the *contract price* and the *reasonable market value.*' We submit that this is not the rule. * * * To test the effect of the rule given, take an example. Suppose testimony had been given tending to show that this stock was worth $5 a share, and that it would have been worth $10 a share had it met the representation of the defendant. The measure of damages then would have been $5 a share. And yet the Court said to the jury that the damages were practically $8.50 a share in the case supposed—the difference between the *contract price $1.50 and the reasonable market value if the property had been as represented,* namely $10 a share."

The opinion of the Court must be read in connection with the contention just stated.

The opinion reads as follows:

"The bill of exceptions states that the Court charged

the jury "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the *contract price* and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been in the evidence before you."

"In this there was error. The measure of damages was *not* the *difference* between the *contract price* and the reasonable *market value* if the property had been *as represented* to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff *might have gained is not the question*, but what he had *lost* by being *deceived* into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as *naturally and proximately resulted from the fraud.* He was bound to *make good the loss sustained*, such as the moneys the plaintiff had paid out, and interest, and any other outlay *legitimately attributable* to defendant's *fraudulent conduct;* but this liability did *not* include the *expected fruits of an unrealized speculation.* The reasonable *market value*, if the property had been as represented, afforded, *therefore*, no proper element of recovery.

"*Nor* had the *contract price* the bearing given to it by the Court. What the plaintiff *paid* for the stock *was properly put in evidence, not* as the *basis* of the

application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the *loss* he had *sustained* in that particular. If the stock had a *value in fact*, that *would necessarily* be applied in *reduction* of the *damages*. 'The damage to be recovered must always be the *natural and proximate consequence of the act* complained of,' says Mr. Greenleaf, Vol. II., § 256; and 'That test is,' adds Chief Justice Beasley in Crater *v.* Binninger, 33 N. J. L., 513, 'that those results are *proximate* which the wrong-doer from his position must have contemplated as the *probable consequences of his fraud* or breach of contract.'"

It is plain, therefore, that the Court intended to decide the case on the principles here stated as the foundation of the rule.

The rule stated in the Court below did give to the plaintiff the "expected fruits of an unrealised speculation." Therein it differed from the established rule. The established rule works out the opposite result, the one which should be worked out, according to the principle stated by this Court in *Smith* v. *Bolles*.

We do not contend, that the "*market* value" is one of the elements in estimating the damage resulting from a proved deceit. Our contention is, that the element is the *actual* value. The market value is, no doubt, often the easiest way of proving actual value. But there are many cases, where there is no such thing as "market value." In every case of deceit, however, the main element in the computation of damage is "actual" value. So it is stated by Lord Cotton, in *Peek* v. *Derry*, as stated on our opponent's brief (p. 9).

The fact is, that our opponents have not correctly apprehended our position. The position for which we contend is, that the measure of damage is the difference between represented value and "actual" value.

V.—No argument of weight can rightly be drawn from the fact, that some of our courts, especially the Federal Courts, have followed *Smith* v. *Bolles* since the decision was promulgated. That result was to be expected. Those cases, we respectfully submit, can have no weight as authority, for the reason that they have themselves been mere submissions to authority.

Even with those decisions against us, however, we ask the Court to make a comparison, as to weight of authority, between the list of cases which we present in support of the established rule, and those that our able and diligent adversaries have been able to discover, in opposition to it.

But we do most strenuously insist, that, under the present resulting situation, this Court should now give its decisive authority in support of the rule which was formerly free from any substantial controversy, the only rule which can be sustained on principle, on sound reason, and thus put an end to all doubts and discrepancies in this branch of the law.

VI.—The question certified should be answered in the affirmative as to proposition A, that is, that the measure of damages to be applied in assessing plaintiff's recovery is the difference between the value of the property as it proved to be and as it would have been if as represented.

ALBERT STICKNEY,
Of Counsel.

STICKNEY, SPENCER & ORDWAY,
Attorneys for Defendants in Error.

In the Supreme Court of the United States,

October Term, 1898,

No. 259.

James M. Sigafus,
Plaintiff-in-Error,

versus

Dudley Porter *et al.*,
Defendants-in-Error.

Come now both the parties in the above-entitled cause by Albert Stickney, Esq., and Edmund Wetmore, Esq., their counsel respectively, and ask the Court to grant a further hearing on the question certified by the United States Circuit Court of Appeals for the Second Judicial Circuit, upon the record of said Circuit Court of Appeals as the same is returned to this Court in obedience to the writ of certiorari issued herein.

Said motion is made as well upon the annexed affidavit of the said counsel as upon the said record and all the proceedings in this cause.

Dated May 12, 1899.

ALBERT STICKNEY,
Counsel for Defendants-in-Error.

EDMUND WETMORE,
Counsel for Plaintiff-in-Error.

5 IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898,

No. 259.

JAMES M. SIGAFUS,
6 Plaintiff-in-Error,

VERSUS

DUDLEY PORTER *et al.*,
Defendants-in-Error.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
7 County of New York, }

ALBERT STICKNEY and EDMUND WETMORE, being severally duly sworn, do depose and say, and each for himself deposes and says: That the said Edmund Wetmore is the counsel for James M. Sigafus, the plaintiff in error in the above-entitled cause, and the said Albert Stickney is the counsel for Dudley Porter and others, the defendants in error therein. That the entire record in this cause which has been ordered to be returned to this Court by the Circuit Court of Appeals, is very
8 voluminous, and that the matters in controversy in the Court below involved many questions of law other than the single question as to the measure of damages which was certified to this Court and which was the only question discussed upon the briefs or in the arguments of counsel in this Court. That whether this Court shall examine any of such other questions, or whether it shall examine only the question as to the measure of damages

in the light of the facts appearing upon the record, it is believed by deponents, and respectfully submitted, that a further hearing and further briefs of counsel will be of assistance to this Court in its decision of the controversy, and that by reason of the complicated state of facts and the length of the record it is in the opinion of deponents essential to the due protection of the rights of both parties that further argument should be allowed by the Court.

ALBERT STICKNEY,
EDMUND WETMORE.

Sworn to before me this 12th day of May, 1899, as to Albert Stickney,

H. S. VAN DUZER,
[SEAL.] Notary Public,
N. Y. Co.

Sworn to before me this 12th day of May, 1899, as to Edmund Wetmore,

R. EMMET DOHERTY,
[SEAL.] Notary Public,
County of New York.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 48.

JAMES M. SIGAFUS,
Plaintiff in Error,

vs.

DUDLEY PORTER *et al.*,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

For greater convenience, we shall continue on this argument the same designation of the parties in the court below.

The action below was for damages, for deceit by the defendant, inducing the purchase of the Good Hope mine, by the plaintiffs.

The defense, from the outset, have misapprehended our contention as to the relation to the entire transaction of William H. Griffith, insisting that we counted on establishing the position that Griffith was defendant's agent.

We have never rested on that position, though we say it is abundantly sustained by the evidence. Our position from the outset has been (Complaint, fols. 14, 15) that "negotiations were entered into through Griffith," and that during these negotiations, and before the completion of the sale, that completion being directly between the plaintiffs and defendant, the defendant committed, and repeated, the deceits in question.

The deceit alleged consisted in a most ingenious and comprehensive scheme of falsification, framed, and in its different stages executed, by the defendant himself, or his immediate subordinates, comprising three main features:

1. *Falsification of the Mine itself.*

This falsification of the mine continued during a period of three years. It involved the expenditure of large amounts of labor and money. Its final purpose was the deception of any examining experts, so as to lead them to a corroboration of the marvellous statements contained in the so-called "Burnham Report," as to the quantity and quality of the ore. The method used to accomplish the purpose was, to work the mine in such a manner as to leave a large body of ore uncovered, and at the same time conceal all the barren spaces, which were many and large. This was done by excavating the mine at different levels, in different directions, until the excavations reached rich ore; by stopping the excavation where rich ore was reached; and by concealing the barren tracts by timbering, or by filling in, where timbering would not suffice.

The final result, intended and accomplished, was to make it an impossibility, for any ordinary examination, by experts of ordinary skill, to ascertan the real quality of the mine; and especially to make it an impossibility to detect the falsity of the statements in the "Burnham Report" as to the mine's past product, past expenditure, and present condition.

2. *Fabrication of the "Burnham Report."*

This so-called "Report," which was concocted by the defendant himself, contained divers statements as to the continuousness of the ore vein, its width, the actual past product of ore, the actual cost of past production, and the actual amount of ore then "in reserve" and "in sight" in the mine.

Taken by itself, this so-called "report" would have been comparatively harmless. No prudent purchaser would have acted on it, without a verification of its statements. The purpose in its concoction was two-fold: first, by means of its statements of immense quantities of very rich ore, to induce purchasers to make an examination; and second, by means of the previous falsification of the mine, and the subsequent falsification of the expert examination, to secure a corroboration by the examining expert of the statements in the Report.

3. *Deceit of the examining expert.*

This was to be accomplished in two ways: First, by the previous falsification of the mine itself; and second, by falsification of the mill run, that is, the test made by the expert of ore taken from the mine, supposed by him to be taken honestly from all parts of the mine, and run through the mill, during his presence.

This last falsification was by the defendant himself, and by one Cheatham, his superintendent. The falsification of the mill run consisted, first, in the falsification of the number of cars of ore hoisted for the mill run from the mine, that is, falsification of the quantity of the ore tested; second, falsification of the ore so hoisted, by putting in the cars, as they were sent up, the contents of bags of unusually rich ore, which had been

taken from the mine at different times during the three years of preparation; third, by the putting in the mill, while the ore was running through it, of additional specimens of gold ore of great richness. The falsification of the mill run, therefore, was two-fold of quality, and quantity. The falsification of the quantity, by falsifying the number of cars, and by the sending up of the sacks of rich ore, was by the superintendent, Cheatham. The putting in the mill of rich specimens was by the defendant, with his own hand.

The entire combination—of the three features of the scheme—worked in this way: The so-called "Burnham Report," with its marvellous statements, as to the continuousness of the ore vein, its great width, the absence of barren spaces, the large quantities of ore got out in the past, the slight cost of extracting and milling the ore, and the large masses of ore still "in reserve" and "in sight," acted as a bait, as the inducement—to an examination. Afterwards, when the examination came, then the large width of the vein throughout all the surface then left open to examination, the absence of barren spaces, and the great richness of the ore at every accessible point, could not fail to lead the expert, from his own examination, to believe in the accuracy of the statements of the Burnham Report. To ensure still greater certainty, however, that the expert should be convinced of the accuracy of those statements, the defendant made a still further falsification, of the mill run, in the manner before stated.

It is easily seen, that the skillful execution of this entire scheme (and the execution was with remarkable skill) would make detection of the fraud, through any ordinary examination, by any ordinary process, a virtual impossibility. Wherever the expert turned, he found gold, in ore of great richness. The barren spaces, which in fact were many and long, were skillfully concealed, so that they could be discovered only by long continued operation of the mine; by precisely such operation, as did finally result in the discovery of

the fraud by the plaintiffs after their purchase. Any conclusion other than that the statements in the Burnham Report were accurate, was beyond any reasonable possibilities of any ordinary expert examination. The result of any such examination, under ordinary methods, was a foregone conclusion.

Such was the fraud in its entire combination.

Its chief essential feature, however, was the fabricated Burnham Report, with its detailed statements of actual production, and actual expenditure in the past, and actual tonnage of "ore in reserve" and "ore in sight." This Burnham Report was the central feature of the fraud.

The Evidence.

I.—As to the falsification of the mine.

The evidence on this part is the testimony of Doran the defendant's superintendent during the three years' work of preparation; of Egan, the expert, on whose examination the plaintiffs made their purchase, who discovered the concealed barren spaces; of Kingsbury, one of the miners who laid aside the sacks of rich ore for subsequent use in the examination; and finally, and chiefly, the cross-examination of the defendant himself, and his letters.

Doran testified that he conducted the work of the mine for about three years; that he excavated the mine at different levels, and for long distances; that the excavations on each level were pushed till they reached rich ore; that at those points the excavations were stopped; that large barren spaces were concealed, by timbers and filling in; and that all this was by defendant's own direction.

Especially Doran testified to two long stretches of barren space, one at the north end, and the other at the

south end, of the second level, one 80 feet in length and the other 150.

Egan also testified to the fact of a sketch map being drawn by the defendant himself at the time of his examination, which represented the excavations as stopping at these barren spaces. He also testified that these barren spaces were concealed at the time of his examination; and that they were discovered, only after he began operating the mine, after its purchase by the plaintiffs.

Kingsbury testified that during the three years of the preparation, he had laid aside sacks of very rich ore, and that that was the rich ore sent up during the mill run, by direction of Cheatham, the then superintendent.

Testimony of Doran, fols. 77-83.
do do fols. 66.
do Egan, fols. 85-91.
do Kingsbury, fols. 128-132.
do Defendant, fols. 946-977.

The defendant on cross-examination conclusively established the falsity of the defence, and the accuracy of our charges, at every point. But as to this point of the three years' preparation, by means of a systematic scheme of the exposure of rich ore, and the concealment of barren tracts, the defendant, after giving a wholesale denial of his connection with any such scheme, on being confronted with his own letters to Doran, made a complete collapse. He began with a profession of complete ignorance as to the existence of any such treatment. He ended with a confession.

Cross-examination defendant, Appendix A.

The cross-examination on this point not only conclusively established the defendant's guilt, but it finally destroyed his character as a witness—by showing his entire readiness to testify under oath to anything which he thought would serve his ends.

II.—As to the Burnham Report.

On this branch of the case, it will be found that the evidence to support our charge of deliberate falsification, by the defendant, reaches the completeness of mathematical demonstration.

Here, too, the plaintiffs' charges were substantiated, mainly, by the forced confession of the defendant himself.

The record contains two copies of this Burnham Report, in vastly different form. The one delivered to Egan, on which he made his examination, and on which the plaintiffs made their purchase, appears at fols. 1415-1473, and is marked Plaintiffs' Exhibit A.

The other was discovered in the possession of the defendant on his cross-examination; and was put in evidence by the plaintiffs at fols. 1615-1655 as Plaintiffs' Exhibit 33.

Of these two copies, the copy furnished to Egan (Plffs'. Exhibit A), and submitted to the plaintiffs, turned out to be a falsified later edition of Exhibit 33, by the bodily incorporation in Exhibit 33 of entire new pages of figures, and of entire paragraphs of statements of alleged facts wholly without foundation, made by the defendant himself, or his amanuensis, Bird.

The evidence established the following specific facts:

1. That the copy of the so-called Burnham Report (marked Plaintiffs' Exhibit A) which Egan used on his examination, and on which the plaintiffs made their purchase, came from the hands of the defendant. It was identified by Doran, as the copy delivered by him to the defendant to be mailed to Griffith; by Griffith as the copy received by him from defendant; and by Egan as the copy by him received from Griffith, through Col. Platt, and in his possession at the mine at the time of his examination.

The defendant himself finally admitted its identity, and its origin.

Testimony of Doran, fols. 94-98.
" Egan, fols. 219-220.
" Egan, fol. 355.
" Griffith, fols. 548, 549.
" Defendant, fol. 987.

2. The statements in the report, concerning the continuousness of the ore vein, the absence of barren spaces, the width of the " pay streak," the quantity and richness of past product, the actual cost of that product, the average ore value per ton of that past product, and the amount of the ore then " in reserve " and " in sight " are as follows:

At fol. 1426, the statement is:

" The quartz on all dumps assayed from a trace to $50 per ton, the same holds good of south and surface openings. *The conclusions reached are that at no place on the vein so far opened are there long stretches of barren ground—the extreme distances sampled being 3,300 feet apart.*"

At fol. 1439, the statement is:

" Now, as connection has been made with the south workings, and it is clearly proven to be *one continuous vein,* and as the surface cuts and shafts show its *continuity to the old workings north, and thoroughly explored, block by block, for a distance of 900 feet, places the ore in sight to at least the depth of present workings, and from the old workings of San Jacinto to the old workings of Good Hope, less the ore in reserve, gives a block 640 x 360 feet equal to 37,333 tons.*

" At $18 per ton, equal to.....$671,994.00
Total in sight $80,100 and
$671,994..... .... 761,094.00

"The drifts north are both being driven, and, on widening pay-streaks, between well defined walls. *In a few months this entire block, now figured as being in sight can be placed as ore reserve.*"

At fol. 1433, the statement is:

"These numerous measurements show that the pay [pay streak] is very even and *continuous through the entire mine.*"

Thereafter were given detailed statements, as to "ore in reserve," "ore in sight," actual past product, actual bullion returns, and actual expenditures, which statements appear in Appendix B.

The report ends with the following summary:
Fol. 1473.

"SUMMARY.

Length of ore shoot	3,300 feet.
Lowest depth attained	416 feet.
Number of feet developed	3,000 feet.
Width of fissure	4 to 10 feet.
Width of pay streak	Average of 2 feet.
Tonnage in reserve	44,733.
Net value in reserves	$805,186.
Tonnage in sight	37,333 tons.
Net value in sight	$761,094.
Average of all ore milled per ton	$23.78.
Number of tons milled	2,434.
Bullion produced in the past 12 months	$57,879.78.
Total expense	$15,509.
Estimate total *bullion produced*	$317,879.78."

The meaning of these statements as to "ore in reserve" and "ore in sight" is thus given by Egan: "By ore in sight is meant ore that has been measured and sampled on one or two sides. * * * Ore in

reserve is ore that is blocked out and that can be measured and sampled on all or nearly all sides."

Testimony of Egan, fol. 236.

See extract from Burnham Report, Exhibit A, in Appendix B.

3. The falsity of these statements is established as follows:

(*a.*) As to the existence of long barren spaces.

Testimony Doran, fols. 81, 83, 89, 90.
Testimony Egan, fols. 234, 235.
Testimony of Foster, fols. 432-434.
Testimony Smith, defendant's expert witness, fols. 1234, 1235.

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(*b.*) As to quantity of past product.

Whereas the Burnham Report states the past prod-

uct to be $317,879.78, the defendant on his cross-examination admitted, that all the bullion from the mine had gone to his own bank, the Chemical Bank, in the City of New York. He was finally compelled to produce the mint returns for the entire period of his ownership. The mint returns which he produced were then compared with the figures stated for the mint returns in the Burnham report; and the fact was then admitted, that of $51,880, the amount so stated in the Burnham report, $33,054 was a pure fabrication.

This left only $17,826 as the value of the gold shown by the bullion returns, that is, of bullion resting on any evidence, which came from any source connected with the defendant—this mine or any other. For the defendant owned more than one mine; and no evidence was given by him to show what part of his entire bullion product came from the mine in question, or what came from other mines owned by him. The defendant was then challenged to explain these figures in the Burnham Report, and his cross-examination took this form (fols. 991, 992):

> "Q. Can you explain to the jury how it happens to be that a report made in 1891, [the date he had given for the report] early in the year, contained a statement as to the output of your mine *down to February, 1892?*
>
> "A. *It did not.*
>
> "Q. *How did it get there,* then?
>
> "A. It is *like lots of those other statements, that $317,000, that nobody ever heard of, only you,* OR THE MAN THAT PUT THEM THERE."

As to who was "the man who put them there," the later statement of the evidence will leave no doubt.

The point here made, however. is that the defendant, in an incautious moment, admitted that this figure of $317,879.78 was wholly without any foundation in fact; that it was a mere fabrication—by some one.

The entire total of the mint returns for the past pro-

duct of the mine from March, 1890, to December, 1893, was $61,590.50.

Defendant's Exhibit G., fols. 1678-1680.

(*c.*) As to quality of the past product.

The statements in the Report are all based on the alleged mint returns, incorporated bodily in that Report at fols. 1435-1437, page 479.

As to these mint returns, as has just been stated, defendant's cross-examination developed the most extraordinary fact, that these returns, so far as concerned the Good Hope mine, were absolute fabrications, by the defendant, or his bookkeeper, his son-in-law, J. Everett Bird.

The evidence of this fabrication was as follows:

The defendant was confronted with written copies, or statements, purporting to be mint returns of another mine, the Homestake, which was owned mainly by defendant and Mr. and Mrs. Bird, Mrs. Bird being defendant's daughter. Those papers were in Bird's handwriting. With that handwriting, of course, defendant was thoroughly familiar. The defendant in his cross-examination on this point began by professing his complete ignorance even of the handwriting. He ended with another confession that *these mint returns of another mine*, if indeed they had any genuineness whatever, *had been incorporated bodily in this so-called Burnham Report on the Good Hope.* Thereupon followed one of the most remarkable statements, by the Court, of an admitted wilful falsification, in which the counsel for the defense acquiesced.

We ask the Court to read the following extract from defendant's cross-examination on this point. It is virtually conclusive, as to the main issues of fact in this case.

Fols. 998-1022.

"Q. Now, I show you the copy of this Burnham report, which has been previously identi-

fied as the one received by Mr. Griffith from you. You will notice there is an entire sheet in that one containing the alleged returns of gold bullion from the United States Assay Office to the Good Hope Consolidated Gold Mines. You notice that sheet, do you?

"A. Yes, sir.

"Q. That is a separate sheet. Is there any such sheet in that one? [This referred to the other copy, Plaintiff's Exhibit 33.]

"A. No, sir.

"Q. Where did that sheet come from?

"A. I couldn't tell.

"Q. No knowledge, information or belief?

"A. No, sir.

"Q. *In whose handwriting are those papers that I show you now?* (Handing witness papers.)

"A. *I don't know.*

"Q. Whose handwriting do they resemble?

"A. *They resemble Bird's handwriting.*

"Q. You notice the heading, 'Return of gold bullion from the United States Assay Office to the *North Homestake* Mining Company, *White Oaks, New Mexico?*

A. Yes.

"Q. That was a *mine owned by you*, was it not?

"A. Yes, sir.

"Q. And that printed heading is at the top of each of those bullion returns, is it not?

"A. Yes.

"Q. Is that regular paper that belonged to you and was used by you in the business of that mine?"

"MR. WETMORE: I don't quite see the relevancy of this. Here is a matter with some other mine.

"MR. STICKNEY: Oh, no. These three sets of figures appear in that Burnham report as the returns of the Good Hope Mine, and it is another mine of this defendant, and here

they are in Bird's handwriting without a doubt, and we shall prove that the figures are put right in here as the figures of the Good Hope Mine.

"MR. WETMORE: I object, upon the ground that there is no connection proved with this defendant, or the cause of action set forth. Apparently he wishes to prove that this is in the handwriting of Mr. Bird, and are returns from the North Homestake Mining Company, in which Mr. Sigafus had an interest, and, Mr. Stickney, that these returns correspond.

MR. STICKNEY: Those returns, which are on this defendant's own paper——

"MR. WETMORE: It is not on the defendant's own paper.

"MR. STICKNEY: Oh, yes. Then they appear stated in this Burnham report, which comes from him as the figures of the Good Hope Mine.

"THE COURT: What period do they cover?

"MR. STICKNEY: For the month of January, 1892; the first one bears date February, 1892. Then, in the table underneath the figures, the return is February 1st.

"THE COURT: Can't you give me the entire period covered?

"MR. STICKNEY: One is January 10th, 1892, one February 10th, 1892, and one December 10th, 1891, so that we have the three last months of the period alleged to be covered by the sheet that is included in the Burnham report.

"Q. During the month of December, 1891, January, 1892, and February, 1892, were you the owner of the North Homestake Mining Company at White Oaks, New Mexico?

"A. I owned a one-sixth interest in it.

"Q. Who owned the rest of it?

"A. Dr. Hunter owned two-sixths, J. Everett Bird owned one-sixth, and his wife two-sixths.

"Q. Was this the paper used for the return of that mine, to your best recollection and belief?

"A. *I don't know.*

"Q. Did you ever see a paper of that sort before?

"A. *I might.*

"Q. Where did you see it?

"A. *I don't know.*

"By the Court:

"Q. Haven't you any knowledge yourself about the mint returns of that mine during the period covered by these reports?

"A. *It was all sent to the Chemical Bank in New York.*

"By Mr. Stickney:

"Q. *And that is your bank, isn't it?*

A. *Yes, sir.*

"Q. *And this bullion was sent to your own bank?*

"By the Court:

"Q. You probably took interest enough in the matter to know what the mint reports were that were coming from your Homestake mine?

"A. *Those are not mint reports.*

"Q. *What are they?*

"A. *I don't know.* They are a copy of some paper or other. *They are not mint returns.* I have got all of them—200 or 300 of them.

"Q. *Don't they purport to be copies of the mint returns?*

"A. *I don't know what he claims them to be.* I never saw them. I never saw any paper of that description or that character.

"By Mr. Stickney:

"Q. Never saw any paper of that description or character?

"A. No, sir.

"Q. Are you watching your words?

"A. *I am watching them, yes, sir. The mint receipts are all here, and I can produce them.*

"Q. Produce them?

"A. I cannot to-day.

"Q. Produce them now?

"A. I cannot.

"Q. You just said they were all here.

"A. *They are here in New York, in this city.*

"Q. Where is Mr. Bird?

"A. He is at home, I suppose.

.. Q. Where is his home?

"A. 96th street.

"Q. In this city?

"A. Yes, sir.

"Q. When did you last see him?

"A. Sunday.

"Q. Is he attending here, has he been in attendance here for the purpose of testifying?

"Q. No, sir.

"Q. Do you intend to produce him to testify?

"A. *I don't know.*

"Q. Where is it that the mint returns which you say you have in your possession or custody somewhere of the North Homestake property, now are?

"A. I can get them.

"Q. *Where are they?*

"A. *I don't know.*

"Q. *How do you know you can get them if you don't know where they are?*

"A. I will take the chances on that.

"Q. And have you no knowledge where they are now, at this moment?

"A. No, sir.

"Q. Where did you last see them?

"A. *I have not seen them in two years.*

"Q. Where did you last see them? I did not ask you when?

"A. *In California.*

"Q. And you have never had them with you here in New York?

"A. *No, sir.*

"THE COURT: *Mr. Stickney, don't pursue that.* I wish you would just show him the

Burnham report annexed to Col. Egan's deposition and ask him if there were any such returns as purports to be in that report for the mining property in question.

"Q. Now, I show you again this sheet containing the return of the gold bullion from the United States Assay Office to the Good Hope Consolidated Gold Mines, and I ask you to produce now the returns of gold bullion for the Good Hope Consolidated Gold Mine, covering the period from March 4, 1890, to and including February 1, 1892? Produce them, please. Did you hear my question?

"MR. WETMORE: We will produce them.

"Q. Were there any returns for the Good Hope Mine, genuine ones, that agree in dates and figures with those that are set forward on that sheet?

"A. *Some of them.*

"Q. And *that is all you will say? How many?*

"A. I can tell you if I look at them.

"Q. Tell me exactly?

"A. *Here are two;* they are duplicates; *they are inserted twice.*

"Q. What?

"A. Here is May 17th, 1891, 127 ounces and seventy-two one-hundredths, and here is inserted——

"BY THE COURT:

"Q. *Those are genuine?*

"A. *They are inserted twice.*

"BY MR. STICKNEY:

"Q. That is not what we are trying to get. What we want you to point out, if you can, is whether *any that purport to be returns from the Good Hope Mine represent the actual returns of that mine?*

"A. *They are cut up so*——

"MR. WETMORE: If your Honor please, Mr.

Johnson has checked off on the mining receipts that we have—whether they are the whole mining receipts or not I do not know—those that do not appear in the mining receipts—which is the question that Mr. Stickney is asking.

"MR. STICKNEY (to the witness): These (Plff's. Ex. 34) are the ones then given by your counsel *which do not appear vouched for by actual receipts.* Will you adopt that?

"THE WITNESS: I don't know what that is.

"MR. WETMORE: *We will admit that.*

"THE COURT: Well, it is stated by counsel.

"Q. *Your counsel now presents a statement of bullion receipts, of figures of bullion receipts, given in the Burnham report for which you do not have mint returns in that period. 1891,* and the first two months in 1892, and they foot up *$33,054.18.* Now will you be kind enough to give us the mint returns, *the genuine receipts which you do have in that period?* You probably have some statement of them.

"THE COURT: Give me the amount, Mr. Stickney, of that.

"MR. STICKNEY: $33,054.18. Those are the *ones for which they do not have genuine returns.*

"THE COURT: Now, what is the total amount of the returns in this Burnham report?

"MR. WETMORE: That figures up *$51,880.*

"Q. Now, give us the original returns which you do have for that period?

"MR. WETMORE: There they are (producing paper).

"Q. These cover way back in 1890, and a big period, don't they?

"A. Three in 1890, I think.

"MR. WETMORE: They commence March 4, 1890.

"THE COURT: *Then, we must assume it to be a fact in the case, unless changed hereafter* by the evidence, that as stated in the Burnham report, $51,880 is the true return——

"MR. STICKNEY: No.

"THE COURT: No, I see.

"MR. STICKNEY: That $33,054 is the false; that is the item which is put in there without any voucher for it.

"THE COURT: *$33,054 of the $51,800 are fabricated?*

"MR. STICKNEY: That is it, your Honor. Coupled with that, your Honor will bear in mind the statement in the summary of the report that 2,434 tons in that period produced $57,700 in bullion.

"Q. Have you got any statement already prepared of the exact bulletin returns for that period of the Good Hope Mine?

"A. They are there.

"Q. Oh, no. I know the original returns are there, but have you any statement among your papers, a table showing the exact bullion returns for that period?

"A. No, sir.

"Q. Don't you know that those bullion returns for that period correspond exactly with the entries from the Wells Fargo books that we put in evidence here?

"A. No, sir.

"Q. Will you please take my question instead of continually going back and pointing to these?

"MR. STICKNEY: I shall have to put some questions over again.

"THE COURT: *I wouldn't spend any time. I don't wish to dictate, but there are some things that seem to be clear.*

"MR. STICKNEY: I will take your Honor's suggestion, most readily.

"Q. You have already stated that Mr. Bird did keep some books and papers?

"A. I suppose he did, yes.

"Q. Won't you raise your voice? *Do you intend these gentlemen to hear you or not?*

"THE COURT: Try to raise your voice.

You can if you will. It is a matter of some interest to you and if your testimony is to be of any value at all it must be heard.

"Q. *From what source were the figures in the Burnham report taken as to your expenditures?*

"A. *I know nothing about the expenditures, nothing whatever.*

"Q. *Do you know of any source from which they were taken except statements made by Bird in some form?*

"A. *No, sir; I know of no source from which they were taken.*

"Q. *Do you know of any source for either of those sets of items in the Burnham report except Mr. Bird and yourself, and your books and papers?*

"A. *No, I don't know of any.*"

We respectfully submit, that this extract from the testimony of the defendant goes far towards finally establishing *some* of the issues in the case.

(*d.*) As to expense of past production.

In view of these last positions, the figures in the Brunham Report must be assumed to be false, in the absence of any attempt by the defense to establish them by credible evidence; and especially in view of their omission to examine Bird, the keeper of the accounts, in connection with the accounts.

The defendant admitted (fols. 1008, 1009) that Bird was in the City of New York at the time of the trial.

(*e.*) Quantity of "ore in reserve."

As to the figures of "ore in reserve" the defendant made a similar confession, to the effect that the figures in Exhibit A had been raised by thousands of tons, to his knowledge, from the earlier figures in Exhibit 33.

Cross-Examination of defendant, fols. 1030-1032.

But these figures of "ore in reserve" are shown by defendant's cross-examination to be a pure fabrication. By that we do not mean that there was no "ore in reserve" whatever. But these particular figures in the Burnham Report were a pure fabrication, with no pretense of a justification in fact.

The evidence on that point is as follows:

The defendant admitted at fols. 1078-1082, that there had been several editions, "batches," he called them, of the Burnham Report.

A comparison of the two editions of the Report shows that these figures of the tons of both ore in reserve and "ore in sight" were a mere bodily incorporation in Exhibit A of new figures, none of which appeared in the former edition, the accuracy of which the defense made no attempt to prove.

The *editio princeps* of the Burnham Report, that is the first edition appearing in any known historical records, Plaintiffs' Exhibit 33, gives a detailed statement, block by block, of the entire tonnage of ore already measured and sampled, without, however, distinguishing between "ore in sight" and "ore in reserve." That tonnage was given as follows (fols. 1634-1642, summarized at fol. 1654):

	Tons.
Block 1	8,741.2.
do 2	5,012.
do 3	3,228.2.
do 4	1,355.2.
do 5	2,036.
Total Tonnage	20,372.6.

The Court will note the scrupulous regard for the most veracious accuracy evidenced by the decimals.

The tonnage in the last edition (Plffs.' Exh. 33), 44,733 tons of ore "in reserve" and 37,333 tons of ore "in sight," amounts to 82,066 tons.

In other words, there was a mere addition of 62,000 tons.

(*f.*) Quantity of "ore in sight."

The statement in the Burnham Report on this point is 37,333 tons.

As to this figure, given in the latest edition of the Burnham Report, the entire tonnage stated in the earlier edition (Plffs.' Exhibit 33), comprising both "ore in sight" and "ore in reserve" is only 20,372.06 tons (fols. 1654, 1655), so that we have, on this one point alone, on the defendant's showing, a pure fabrication of 16,960 tons.

The utter falsity of the Burnham Report, therefore, is fully established as to these essential particulars:

(*a.*) Continuousness of ore vein, and absence of barren spaces.

(*b.*) Quantity of past product.

(*c.*) Quality, or ore value, of past product.

(*d.*) Expense of past production.

(*e.*) Quantity of "ore in reserve."

(*f.*) Quantity of "ore in sight."

4. The falsity of the statements in the Burnham Report being thus established, we proceed to consider the question of its authorship.

On this point, no conclusion is possible except the authorship of the defendant. By this is not meant, that the defendant actually drafted the report in his own handwriting. What is meant is, that though the hand may have been the hand of Bird, the real author was Sigafus.

Let us see what is the condition of the evidence on this point.

It is confessed, that Bird was defendant's son in law, and part owner of both the Homestake and the Good Hope mines; that he executed with the defendant the contracts with Griffith; that he kept the books and accounts of both mines; that the fabricated mint returns, which belonged to the Homestake mine, if we assume that they had any genuineness whatever, were in Bird's handwriting; that those fabricated returns were incorporated bodily in the Burnham Report, the latest revised edition; and that of those fabricated so-called mint returns $33,054 were a pure invention, having no veritable origin, as to either of the two mines, or as to any mine whatever.

It is then confessed, that this latest revised edition was delivered to Griffith by Sigafus.

The defense, then, omit to call Bird as a witness.

In addition, as the last piece of evidence on this point, we have the statement in defendant's own letter to Doran of June 11th, 1891, in these words: "That will make this lower drift about 900 to measure, which will then give me *more than twice the measurements we had made by Mr. Burnham.*

Cross-Examination defendant, fol. 1026.

The defendant, after the numerous falsifications in this evidence, was confronted with this statement in his letter, and was challenged to explain it with the following result:

Folios 1025 to 1029:

"Q. You have said already that you did not have anything to do with Mr. Burnham's examination?

"A. I was not there. I had nothing to do with it whatever.

"Q. I show you a letter dated June 11th, 1891, addressed to Doran. Who wrote that (handing witness a paper)?

"A. I did.

"Q. I call your attention to this clause in it, about 12 lines from the beginning: 'That will make this lower drift about 900 to measure, which will then give me more than twice the measurements *we had made by Mr. Burnham.*' Is that in your handwriting in that letter?

"A. Yes, sir.

"Q. Do you wish to repeat your statement now that you had nothing to do with Burnham's examination or measurements?

"A. *I wish to explain it.*

"Q. Do you wish to repeat your statement?

"A. *I don't know what you mean by that.*

"Q. You don't know what I mean?

"A. *No.*

"Q. Now, *make any explanation you like.*

"A. *By driving it twice the distance we had double the amount of tonnage overhead.* That is all.

"Q. And that is all the *explanation* you have to make of your expression when you speak of measurements, '*we had made by Mr. Burnham*'?

"A. Yes, sir."

We ask the Court, at this point, to read the extracts from defendant's cross-examination as to the Burnham Report, contained in Appendix C.

In the face of all this evidence, we respectfully submit that, if this question of authority arose on the trial of our indictment, the authorship of the defendant could not be said to involve a "reasonable doubt." Men suffer capital punishment on weaker evidence than that.

The position of the defendant's counsel on this argument as to the Burnham Report, we most respectfully submit, rises to one of grotesque humor. They say, at page 136, with all apparent gravity, that "the *failure* of plaintiff's counsel to *ask Egan* whether he had *shown the paper* Exhibit A *to Sigafus* (*there being several papers going by the name* of the Burnham Report) is

significant, for *without such evidence no identification was possible.*" We must be permitted to say, that this position of our learned opponets, in the face of the presentation of that precise paper to the defendant on the trial, and his admission that it came from him, causes surprise.

For some inconceivable reason, they seem wholly to ignore the evidence of their own client. His evidence, we should concede, in entitled to no weight whatever, for the purpose of establishing any fact in his favor. But what are we to say of the compulsory confessions, wrung from him on cross-examination? That is a feature of this case with which our learned opponents have made no attempt to grapple.

After this overwhelming accumulation of evidence, made wholly free from any possibility of doubt by the cross-examination of the defendant, demonstrating these facts, (1) The falsity of the Burnham Report; (2) defendant's knowledge of that falsity; and (3) his authorship of the falsifications, it will possibly appear to the Court, that it would be a work of supererogation, if we were to spend time on the subsidiary questions, of the defendant's intent in issuing the report, or the materiality of the statements in the report contained.

III.—The falsification of Egan's expert examination.

At the outset, we call the attention of the Court to the fact, testified to by Egan, evidenced by his correspondence, and conclusively established by the circumstances of the case, that Egan's chief purpose, as would have been the case with any examining expert, was to ascertain whether or not the statements of the Burnham Report were accurate. Egan did not believe that they were; or that they could be. If they were, however, here was a property of marvellous value. To use his own expression, here was a mine "made to order," (fol. 1553). So, in fact, it was; made to the order of Mr. Sigafus. This, then, was the primary purpose of Egan's

examination—the verification of the Burnham Report.

The fundamental feature, the backbone, of the defendant's fraud in relation to the examination, especially in connection with the Burnham Report, consisted in the three years preparation, which had made the result of the examination a foregone conclusion. It was this three years preparation which made the detection of the falsity of the statements in the report a virtual impossibility.

As to the fact of preparation, of what might be termed mineral forgery, the evidence has already been stated.

As to the next point, however, the falsification by the defendant of Egan's mill run, as to both quantity and quality of the ore raised from the mine, and run through the mill, the facts are proved by the testimony of Egan himself, of Jepson, who worked the mill; of Cocking, who testifies to the fraudulent alteration of the tally by Cheatham; but finally, by the cross-examination of Cheatham, who made almost as triumphant a success as a witness for the other side as the defendant himself. Mr. Cheatham, after demonstrating his entire willingness to testify to anything and everything which could serve his immediate purpose, was confronted with a statement in writing, over his own signature, which was a complete confession of his own part in the fraud, and of the fact, which needed no corroboration from him, that whatever he had done was done by the direction of the defendant.

Testimony of Egan, fols. 227, 228, 242-246.
do do Cocking, fols. 156-168.
do do Kingsbury, fols. 129-136.
Cross-examination of Cheatham, fols. 811-828, 834-848, 852-855, 867-873.

Cheatham's confession appears at fols. 857-867, and reads as follows:

Extract from testimony of JAMES R. CHEATHAM, folios 857 to 873:

"Q. Now I will read you this statement:

'Whatever I did when Mr. Egan examined the mine, *I did under Mr. Sigafus's instructions*, excepting a few which he did not say anything about. There was some ore in sacks in first level, in stope near second manway, north of main shaft; there was about fifteen sacks more or less. They were there when the mill run of Egan was started. I think I know who mined it, but would not say for certain. I think it was Kingsbury who mined it. I was told by Kingsbury that it was rich ore. I saw part of the ore myself. It looked like rich ore; it looked good. I only saw the top of the sacks. *I should judge it would go $40 easy*, and how much more I would not pretend to say. While the mill run was being made, *I told Manuel Miller to put it* into the chute, and while the mill run was being made I told some car man, I think Cocking, to *send it up so that it would go into the mill*, and *he did so, the car man, whoever it was. That was done for the purpose of getting the mill run. Sigafus told me to send it up into the mill and that was the reason why I did it.* Now, that car man was supposed to keep a tally of his car loads on a board with a pencil. The pencil was hung on the board; the board hung there. The man at the hoist had a tally of the cars also, which he kept on a card. Boren, who was the car man in the second level, he had a tally which he kept on a board. He was sending up cars also. The other car man was on the first level. There may have been a few car loads of ore which were sent up during the mill test, *which did not get on the tally boards, or which got on and were not reckoned. What I mean is, that if there was any mistake or descrepancy between the tally boards, the mine got the benefit of it every time, but I know that I did not deliberately take off from the tally boards any car loads that I was certain*

went up. The bulk of the ore that was sent up for the mill run from the second level was taken from the south of the main shaft and the bulk of the ore from the first level was sent up from north of the main shaft. The majority of the ore put into the mill during the mill test came from the richest parts of the mine. We got some ore from all over the mine, *but the majority of the ore came from the richest parts of the mine, and the ore that was sent up was a good deal better than the average of the mine.*

In sending up superior ore, I only followed his instructions; I mean the instructions of Sigafus. He told me to send up the best ore. Mr. Egan's instructions to me was to send up the average ore from all over the mine, but Mr. Sigafus's instructions were otherwise. The mill run was day times for about three days. I saw the amalgam after the mill run. *In my opinion it was very much richer than the ore we accounted for.* In my own mind, *I thought some one had put very rich ore or amalgam into it.* I didn't put it in. *Mr. Sigafus told me that he was very much afraid the mill run would not run high enough. He said that he wanted it to run thirty dollars. The second level* north of the main shaft had been drifted further than it showed when Egan examined the mine. *It was barren ground, and had been filled up and closed up so it didn't show.* Wilford was working in a raise near it when I was there. The second level south of the main shaft had been drifted into before Egan examined the mine. There was nothing that amounted to anything there, *and it was closed up.* I was mine boss at the time Egan examined the mine. At the end of the mill run, Sigafus said, that he didn't clean up all the amalgam that there was in the mill, and said in substance, or used words that conveyed that impression, *that he was afraid it would show up too rich. I knew the mill run showed up higher than the ore would average.*

I went to work on the Good Hope mine in July,

1890. They got out a good deal of ore in 1890 and piled it all up until they put in the Bryan mill, February, 1891. They did not mill any of it until the Bryan mill was put up. It was a good many hundred tons of good ore; *about $8 ore.* I will not undertake to say how many hundred tons. When the Bryan mill was put up they milled this ore, and also ore they took out in 1892. 'J. R. C.'

The Bryan mill on soft ore would run a ton an hour, but, in my opinion, in 1891 and 1892, the mill, as run, did not average to run over 12 tons a day. Before Egan made his mill run, a mill run had been made by some one who was sent there by some one who talked of buying. *I understood those fellows came here and wanted a mill run, and we gave them one, but they didn't buy it. We gave them a very good mill run.* Sigafus often told me that he had some very rich samples from the White Oaks. There were big gold nuggets in some of it he showed to me. While the mill test was being made there was nothing to prevent anyone from salting the mill run. The mill man did the firing and tended to the mill, and it was an easy thing for any one to salt the mill at any time, even if the mill man was right there. The mill when grinding made so much noise that one wouldn't notice a person walking overhead in the crushing room. Some time in 1892 and 1893 I left the Good Hope mine for two or three months. When I came back, I noticed what I thought to be gold concentrates from the Good Hope mine had in my opinion been squirted on the face of the vein. I knew it was put there by artificial means, but I don't know who did, or why it was done. But I could guess. I scraped it off, some of it, and looked at it. I judged that it was gold concentrates. I had seen gold concentrates before, but never in an ore body. On the north side of the first level, close to the shaft, there was a big body of low grade ore, and there was lots of what I took to be concentrates in it. An Englishman was here and saw it

some six months before, while I worked at the mine; there were a good many people who talked of buying it. Sigafus never had a surveyor in the mine while I was there. *Mr. Jones read this over to me, and made the corrections which I suggested. It is all right, and I am ready to stand by this statement. It was made by me without any inducement in answer to his questions, the 18th day of April, 1895.*

J. R. CHEATHAM.

IV.—As to the deception of Egan, and of the plaintiffs.

This issue, like all the others, was passed on by the jury. But we must state a portion of the evidence.

Egan must have been a man of superhuman acuteness, if he had not been deceived.

We apprehend, however, that on this point, after the developments already made of this most adroit and successful scheme of fraud and falsification by wholesale, that the Court will not consume a large amount of time on this question of fact, whether or not Egan and the plaintiffs were actually deceived by these elaborate machinations of the defendant, but on this issue will readily accept the verdict of the jury.

The testimony, however, on this point, is that of Egan, his letters written at the time to Morse, one of the plaintiffs, to Col. Platt, who then expected to purchase with Morse, to Roberts, Col. Platt's secretary, with the testimony of the three plaintiffs, the purchasers.

Testimony Egan, fols. 267, 268.
do do fol. 280.
do do fols. 249-251.
do Plaintiff Morse, fols. 358, 359.
do do do fol. 362.
do do fol. 365.
Testimony Plaintiff Hobson, fols. 397, 398.
do do do fol. 401.
Testimony of Plaintiff Porter, fols. 520-524.

From the testimony of these witnesses it is clearly established, that the moving cause of the purchase was the corroboration, or the supposed corroboration, by Egan's examination of the Burnham Report.

The contention of the defense on the trial, to the effect that Egan was not the victim, but was the perpetrator, of a fraud, was absolutely unsupported by one word of evidence, was not so much as suggested on the cross-examination of Egan, and was raised for the first time on the trial, after Egan's death. It was only a forlorn hope.

On this point the Court will accept the jury's verdict.

V.—Damages.

The position here is quite simple.

If this Court follows the well established rule of law as to damages for deceit, the verdict of the jury, under a charge, which, concededly, followed that rule, will be readily accepted.

The defense, however, makes a labored attempt to show that the jury's verdict was for an amount that was excessive, and was unsupported by the evidence.

A short consideration of the most important facts bearing on this issue will show that the verdict was far within the most conservative figures.

If we consider only the single item of "ore in reserve," as stated in the Burnham Report, and as it was in fact, we shall find that this single item, throwing everything else wholly out of consideration, more than justifies the amount of the verdict. The Burnham Report stated the amount of the "ore in reserve" as 44,733 tons. The value per ton of that ore, from actual assays, as stated in the Report, was $23.78. The actual cost of mining and milling as stated in the Report was $6.37 a ton. That would give a net value per ton of $17. Those 44,733 tons of ore alone, therefore, at $17 a ton, would have netted, according to the Burnham Report, $760,461. As a fact, however, on

all the evidence, the actual average value of the ore was not more than $8 a ton at the outside, while the cost of mining and milling was as much as $11. At this point, the Court will note the distinction between the average value of the ore in the mine, and of the "ore taken out." Egan gives the value of the "ore taken out" at $10 a ton (fol. 265); and he says (fol. 261) that during his period "he took out the best in quality." Foster, his successor, gives $7 to $9 as the average of the "entire ore body of the mine" (fol. 429), giving the value of the ore "that I took out of the mine" at an average of $10 (fols. 428, 429).

Moorehead puts it at $6 or $7 (fol. 623).

Wilson, who was in charge of the accounts for nearly the entire period of plaintiff's ownership, gives the average value of the ore "taken out" at $11 to $12. Smith, the defendant's own expert, gave assays of 212 samples. Of those 212 samples he was compelled to admit that *104 were of a value less than $3 a ton*, and that 18 samples yielded *no gold at all. His samples, too, were selected by Cheatham* (fols. 1226, 1227). He was also compelled to admit that there were large barren spots, and that the ore lay in "chimneys all through this mine" (fols. 1288, 1289). He was further compelled to admit that there was one "barren spot on the first level north which is probably 150 to 200 feet long" (fol. 1235). Thereafter, when pressed to give the "most accurate statement you can of how frequently you saw barren spots there in the mine," he took refuge in a complete failure of memory (fols. 1234-1238).

The defense attempt to make a point on the fact that the values of ore extracted, in one or two single instances, were above $11 a ton, the figure stated in our question to Mr. Olcott.

Plaintiff's Exhibit 25 shows, as to one period, that the value per ton of "ore taken out" was $11.10, while the cost per ton was $10.77 (fol. 1591). For another

period, about two months, the value of "ore taken out" was $12.75, while the cost was $13.72.

This point has no force whatever, for the reason above stated that the values so given are only of the *ore taken out of the mine* and milled. Moreover, these estimates of value and cost per ton, as Pliffs.' Exhibit 25 shows, are computed on the basis of three cars to the ton (fols. 1591, 1592). Whereas, it was proved that the correct allowance should be 1,200 pounds to a car load.

Testimony of Moorehead, folio 624.
" Boicourt, " 668, 700.
" Smith, " 1300.
" Cheatham " 1176.

The average value of the entire ore body, that left in the mine, with that taken out hoisted and milled, was not more than $5 or $6; that is, much less than the cost of mining and milling.

The evidence shows, therefore, beyond a reasonable doubt, that the cost of production exceeded the value of the ore extracted—owing to the large quantity of barren ground.

The mine, therefore, was practically valueless.

That was practically the testimony of Olcott, Foster and Egan.

Testmony of Olcott,, fols. 731, 732.
" Foster, fol. 430.
" Egan, fol. 265.

If, then, we compute the plaintiff's loss with any reference whatever to the defendant's false representations, we find this situation: If the jury had discarded from the case every fact other than the "ore in reserve," and had awarded as damages only $10 a ton on the 44,733 tons of "ore in reserve" stated in the Burnham Report, the verdict would have been $447,330.

A smaller verdict than that would have had no rea-

sonable justification in the evidence, if the defendant was to be held to any responsibility whatever for his false representations. For these representations gave, as we have seen, a value to the mine of $1,377,067.

Suppose, however, we look at this question from another standpoint—that of a comparison of the price paid by the plaintiffs with the value of their purchase. Although this standpoint is not the one prescribed by the law, a short examination of the situation with reference to it may give us some valuable light.

The price paid by the plaintiffs, so far as appears by this record, was $150,000 in cash and two mortgages—one for $100,000, the other for $125,000; in all, $375,000. In other words, the plaintiffs paid $375,000 for a mine which had substantially no value whatever. For the value of any mine consists in the net surplus of product over cost of production.

From that standpoint, therefore, the verdict is far within the limits.

If the plaintiffs were simply allowed to recover what they paid for that property as the mere purchase price, they should have been awarded $375,000. But it appears in evidence, that after the purchase they paid out large amounts of money for improvements. These amounts would, of course, never have been paid had it not been for the defendant's fraud. The plaintiffs' "loss," therefore, was certainly much more than the mere purchase price. But a recovery of the mere purchase price would be more than the verdict.

If, however, the defendant is to be held responsible, to any degree whatever, for his false representations, then on any conceivable method of computation, the verdict of the jury is very far within bounds.

Upon this question as to damages, the jury had all the evidence offered by either party, especially, nothing was excluded that was offered by the defendant. There were called as witnesses nearly every person of any importance who had worked in the mine, who had actual knowledge as to the quantity and quality, of its product, and the cost of production.

The amount of the verdict, $330,275, is extremely moderate, in view of the facts which were beyond the possibility of reasonable controversy.

It is necessary to call attention to certain unfortunate inaccuracies in the Specifications of Error as stated in the brief of the counsel for the plaintiff in error. It is of course inconceivable that counsel of the standing of our opponents in this case had any intention of misleading this Court. But it is submitted that such a result is inevitable, if the statements in the brief are permitted to pass uncorrected.

The Specifications of Error referred to are those which are claimed to challenge the admissibliity of expert testimony. They are the *Third*, *Fourth*, *Tenth*, *Nineteenth*, *Twentieth* and *Twenty-third*.

If the record is examined it will be seen that, as to the testimony which is the subject of the *Fourth* specification the objection was only to its "competency" (Rec., fol. 131); as to the *Tenth* specification, the objection in the record (fols 277, 278) was only that the testimony was "incompetent, irrelevant and immaterial." There was no suggestion of any of the "grounds of the objection" which are set forth in detail at page 42 of the brief. In neither case, as the record shows, was any point made against the evidence as expert evidence.

As to the testimony which is the subject of the *Third* specification, the language of the objection was that it was "incompetent and calling for an opinion" (Rec., fol. 80). The counsel did not point out whether the objection was to the expert's qualifications, to the propriety of expert testimony on the subject, or to the sufficiency of the basis for expert opinion.

As to the *Nineteenth* and *Twentieth* specifications, the brief (pp. 50 and 52) inaccurately states as one of the grounds of objection that the hypothetical question "*assumes as facts* pure matters of opinion." The re-

cord shows that the language of the objections in that regard, was only that "it *calls for* pure matters of opinion" (Rec., fols. 727, 731, 732).

More important still, it would seem from a reading of the brief that the particular portions of the hypothetical questions, now claimed to be based on assumptions not supported by the evidence, were called to the attention of the Court. The fact is that at the trial not one word of the hypothetical question was pointed out as obnoxious to the objections now urged. The objection was taken in the most general terms, and the particularizations now advanced are undoubtedly put in their present form to meet the requirement that the objection must specify the vice in the question, complained of.

Upton v. *McLoughlin*, 105 U. S. Sup. Ct. Repts., 640. "The defendant also contends that various objections and exceptions taken by him to the admission of evidence, and to instructions to the jury, and various grounds of error stated in the motion for a new trial, raised the question referred to. It is sufficient to say, that the objections to the admission of evidence merely state that the evidence is *incompetent, immaterial and irrelevant, without suggesting the question of the Statute of Limitation;* and that the exceptions to the instructions to the jury and the grounds of error set forth in the motion for a new trial make *no allusion to that question*, nor is there any allusion to it in the record sent from the District Court. Under such circumstances, *the question cannot be raised in the Appellate Court. Mays* v. *Fritton*, 20 Wall., 414 (87 U. S., XXII., 389), and cases there cited; *Beaver* v. *Taylor*, 93 U. S., 46 (XXIII., 797); *Wheeler* v. *Sedgwick*, 94 U. S. (XXIV., 31)."

Wheeler v. *Sedgwick*, 94 U. S., 1: "The *attention* of the Court below was *not called to the particular objection now taken* to the recovery of one-half the amount shown to be due upon the account headed, 'G. M. W. Chic. and N. W. account,' to wit., that it was a joint

account of the defendant and one of the bankrupts, and that the defendant could not be sued upon it alone. This being the case, it is too late to make it now.

Duncan v. *The Francis Wright,* 105 U. S. Sup. Ct. Repts., 381. "Every bill of exceptions must state and point out distinctly the errors of which complaint is made. It ought also to show *the grounds relied on to sustain the objection presented,* so that it may appear the *Court below was properly informed as to the point to be decided.*"

As to the *Twenty-third* specification the brief (p. 55) inaccurately states the ground of the motion to strike out. The record (fol. 1349) shows that the ground of the motion was that the testimony "affords no criterion "to go to the jury and that upon his own statement in "answer to the hypothetical question put to him, the "data would not permit of an accurate answer."

Nothing whatever was said of its "being based upon "assumed misrepresentations of facts as to which rep- "resentations there was no proof," or as to its being based upon assumed facts, as to which there was no proof. *Especially nothing was said either on the motion to strike out, or in the objection to the testimony as to its "being based upon an erroneous theory as to the "measure of damages."* The statement in the brief, "all of which objections were taken first at the giving "of the testimony," which follows immediately after the phrase "an erroneous theory as to the measure of "damages," is wholly inaccurate and misleading.

The positions now urged are mainly afterthoughts.

See Opinion of Court of Appeals, pp. 624, 625, 626.

Argument on the Law.

We assume that the intention of this Court is to consider mainly the question that was certified to it by the Court below, that is, the correctness of the rule of damages, laid down in the charge of the Court to the jury. We assume that the entire record has been called for by this Court simply for the purpose of enabling it to possess itself more fully and accurately of the facts upon which the question of law as to damages arises.

At the same time, we have been compelled by the course taken by our adroit and astute opponents, to go into an examination of the entire case on the facts. They are seeking to reargue the entire case. We have been compelled—to some extent—to follow their devious course.

This attempt of our opponents to argue the entire case on the facts, and to impress the Court with the idea that the verdict was a mere "speculative" verdict, that it was against the weight of evidence, and that the damages were excessive, compels us to add, that the defense made a motion for a new trial on those very grounds before the judge who presided at the trial, that those grounds were all elaborately argued, and their motion was denied. We have had, then, in addition to the verdict of the jury, a careful consideration of all these points by the tribunal best able to form a correct judgment on those points, and a decision on all those points by that tribunal.

This Court has more than once decided, that in such a case in the United States Courts an appellate tribunal will not review the decision of the Court below.

Home Ins. Co. v. *Barton*, 13 Wallace, 603.

Pittsburgh R. Co. v. *Heck*, 102 U. S., 120.

The opinion of the Court of Appeals, however, carefully considers the evidence on all the issues in the case;

shows that that evidence was much more than sufficient to sustain the verdict; and shows also, which is much more to the purpose, that the defense failed to except to the portions of the charge on those points which are now alleged to constitute error.

Opinion, pp. 620, 621, 622.

We submit the folowing positions:

I.—The fraud in this case consisted of more than mere false representations. It was a most ingenious combination—of words of falsification, and acts of falsification; the words of falsification being mainly contained in the Burnham report; the acts of falsification consisting mainly in the fabrication by the defendant, complete or partial, of that report; together with an elaborate and comprehensive falsification of the mine, and of Egan's mill-run, so contrived as to make an accurate estimate of the value of the mine an impossibility; and to virtually compel a belief in the accuracy of the statements of the Burnham report.

Although the Burnham report purported, in many of its statements of fact, to relate to the mine's product of the past, yet the main evident purpose of the false statements in the Burham report as to the mine's past product, was to deceive and defraud purchasers as to *its value at the time of purchase*. They were intended to have that effect. It was a certainty, that they would have that effect.

Here it is well to call attention to two ingenious points made by our opponents; they are, that the Burnham report was undated; and that it showed on its face, by careful computation, that many of its statements were false. In fact, the defendant himself was finally compelled to take the position, that he was aware of the

falsity of the statements, and that consequently he forbade the use of the report.

Testimony of defendant, fols. 1028-1030.

Under those circumstances, we submit, that in the absence of a date to a paper which is conceded to be a fabrication, the parties to whom it was delivered had the right to assume that it spoke as of the date of its delivery.

The other point, that the plaintiffs had no right to rely on a forged paper, the falsity of which could be shown by careful mathematical analysis from its own figures—we respectfully submit, that such an argument, coming from the party guilty of the forgery, has in it an element of the humorous.

It is also too plain for argument, that although the Burnham report contained many statements of matters of mere estimate and opinion, it was also full of statements as to matters of fact. Moreover, it was those statements as to matters of fact, which gave to the Burnham report nearly its power for fraud and deceit.

The legal principles and rules applicable to the case established by the evidence are to be found in the following authorities:

Smith v. *Richards,* 13 Peters, 26, 35.
Mudsill Min. Co. v. *Watrous,* 61 Fed. Rep., 163, 167, 168.
Farrar v. *Churchill,* 135 U. S., 609, 615.
Benton v. *Ward,* 47 Fed. Rep., 253, 256.
Henderson v. *Henshall,* 54 Fed. Rep.,320.
Roseman v. *Canovan,* 43 California, 110.

Smith v. Richards, 13 Peters, 26, 35, contains a very full statement of the law applicable to cases like the one at bar. That case was one where the fraud in question had prevented an examination from being made. But the principles and rules there stated apply with equal force to the cases, like *Mudsill Min. Co.* v. *Watrous*, 61 Fed. Rep., 163, where the fraud consisted largely in the falsification of samples, which made it an impossibility that the examination made should give an accurate estimate of the real value of the mine at the time of the examination.

In *Smith* v. *Richards*, p. 35, the Court say:

"We think that the specimens and washings which were forwarded to Nathaniel Richards were not fair samples of the mine.

"The only proper purposes for which they could have been exhibited, was to enable purchasers to form an estimate of the richness of the mine; the appellant, therefore, in our opinion, ought to have caused to be exhibited, either specimens of the richest and poorest quality, so as to show the extremes, or some of an average quality, knowing that the persons to whom he requested them to be exhibited, and amongst them the appellee, had never seen the mine. *Any other course, under the circumstances, could not fail to produce a false estimate of its value.*

"Having come to these conclusions in relation to the facts of this case, the next inquiry in order is, what is the law of the case?

"It is an ancient and well established principle, that whenever *suppressio veri* or *suggestio falsi* occur, and more esepecially both together, they afford a sufficient ground to set aside any release or conveyance.

"This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text writer on equity.

"In 1 Maddock's Chancery, 208, it is thus stated: 'If, indeed, a man, upon a treaty for any contracts, make a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud and relievable in equity.' The doctrine thus laid down is almost in the very words used by the Chancellor, in the case of *Neville* v. *Wilkinson* (1 Brown's Chan. Cases, 546), with the exception of the words whether knowingly or not; and the part of the proposition embraced by these words, is founded upon the case of *Ainslie* v. *Medlicot* (9 Vesey, 21), which fully sustains Mr. Maddock. In this latter case the following strong language is used: 'No doubt, by a representation a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound, though his mistake was perfectly innocent.'

"But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer on equity, who gives us, in the form of distinct propositions, what he considers the result of the various cases on the subject, and marks, with particularity, the modifications which belong to it.

"In 1 Story's Equity, 201, 202, it is thus stated: 'Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a *positive fraud, in the truest sense of the terms;* there is an *evil act,* with an *evil intent—dolum malum, ad circumveniendum.* And the misrepresentation may be as well by *deeds or acts,* as by words—by *artifices to mislead,* as by *positive assertions.*'

"Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial,

for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in *Neville* v. *Wilkinson*, 'it *misleads the parties contracting, on the subject of the contract.*' * * * * (p. 37.)

"The principles of these cases we consider founded in sound morals and law. They rest upon the ground that the party selling property *must be presumed to know whether the representation which he makes of it is true or false.* If he *knows it to be false,* that is *fraud of the most positive kind;* but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. (6 Ves., 180, 189; Jeremy, 385, 386.) The *purchaser confides in it, upon the assumption that the owner knows his own property, and truly represents it;* and, as was well argued in the case in Cranch, it is *immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller.*

"We will next inquire whether the misrepresentation in this case comes up to the rule which has been laid down. In the first place, it must be of matters of fact; and it has been argued by the appellant's counsel, that the letter of the 21st of January, 1833, *did not profess to state matters of fact, but to express opinions.* It is certainly true, that matters of opinion between parties dealing on equal terms, although falsely stated, are not relieved against; because they are not presumed to mislead, or influence the other party, *when each has equal means of information.* But we consider the representation in this case *not the expression of opinion, but the statement of facts.* The appellant, in giving a description of a mine in Virginia, which he desired to be ex-

hibited to the appellee in New York, says, that one hundred feet on the vein had been delevoped, which proved to be very rich, much richer than anything yet discovered in the United States. That the surface was rich in gold; that the *formation was quite wide, and in one place twelve feet; that the veins were disseminated throughout the whole formation, in threads of from two to six inches wide; and that there was ore from the mine that would without doubt give several hundred pennyweights of gold to the hundred pounds.* Now, as to *one of these statements, beyond all question is a matter of fact;* we mean the one which *describes the width of the formation and veins.*

"Having made a personal examination, he declares the formation to be wide, *gives the actual width in one place, and then the width of the veins, in terms not of conjecture, but of the most positive assertion. He gives their dimensions by feet and inches.* This statement, then, comes up to the *standard of mathematical certainty.* And even in regard to the others, he *does not profess to speak of them from conjecture,* but speaks of them *as they are, without qualification.* Take, for example, this:—The surface is rich in gold. *Not that he thinks it will turn out to be rich, but that it is rich.* It was argued that there was no standard by which to decide what quantity of gold would justify calling it rich. There is *none by which it can be decided with mathematical certainty;* but the *law does not require it.* Suppose that a seller was to describe to a distant purchaser, a tract of land as being rich, and it were proven to be poor, or very poor. Can it be that a court of equity would not give relief in such a case? The *certainty in the one case is as great as in the other;* and the misrepresentation as to richness must be proven in each case, by the evidence of those who understood the quality of the one or the other."

In *Smith* v. *Richards,* too, where a decree of rescission of the sale of a gold mine was granted on the ground of

fraud, and affirmed in this Court, the counsel for the appellant, Mr. Webster and Mr. Ogden, conceded, (p. 28,) that the decree ought to be affirmed, if "it should also appear, that he committed positive fraud, by *resorting to some means of concealing the defects and misdescription, and by artifice and contrivance* prevented the purchasers from discovering them."

In *Mudsill Min. Co.* v. *Watrous*, 61 Fed. Rep., 167, 168, the Court say:

"If, therefore, the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, *actively intervene to prevent* investigation and *the discovery of the truth*, and *such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out.* In every such case *immunity will not be extended to false expressions of opinion*, upon the ground of 'puffing' or 'trade talk,' if it appears that the vendor has, by his conduct, prevented investigation, and induced reliance upon the statements of the seller. In such a case the subsequent *conduct of the seller in actively preventing the buyer from the formation of an independent opinion so connects itself with the original misrepresentation as to become part and parcel of the false statement*, and amounts in law to *the false affirmation of a fact. A false representation* may, and most often does, consist in language alone, expressed or written; but it *may also consist in conduct alone, or external acts.* Whenever the purpose is to *induce belief in the existence of a fact which does not exist*, every word and *act intended to produce conviction and induce action becomes a misrepresentation if, through their instrumentality, the party upon whom they are practised is induced to act.* 2 Pom. Eq. Jur., §877. The gravamen of the alleged fraud lies in the allegation that when the complainants undertook to examine this property, and form an independent judgment as to its value, through the *active and willful intervention of de-*

fendants, their samples were rendered untrustworthy by the secret admixture of silver in a form in which it did not exist in this mine; that the *purpose was to give to these samples, otherwise representative of the average value of the ore in sight, a false and fictitious value, which would confirm the untrue statements expressed theretofore as to the silver contents of the mine.* Now, it must be evident that, if this was done, a *most abominable fraud was practised,* and that *no court would suffer a contract resting upon such a foundation to stand.* *

II.—At the outset, it is necessary to call to the attention of the Court the well established fundamental distinction, between the two opposite remedies in cases of fraud; the one being that of rescission, usually asserted in a court of equity, which proceeds on a disaffirmance of the contract, and entitles the purchaser to return the property purchased, and recover the consideration paid —as such; the other being the right to damages in a common law action of deceit, which proceeds on an affirmance of the contract, wherein the defrauded purchaser retains the property purchased, allows the vendor a credit for the actual value of that property, and recovers as his money damage the difference between the actual value and the value represented.

Yeomans v. *Bell,* 151 N. Y., 230.
Bradley v. *Bosley,* 1 Barb. Ch., 125, a decision by Chancellor Walworth.
Krumm v. *Beach* 96 N. Y., 398.
Gould v. *Cayuga Bank,* 86 N. Y., 75.
S. C., 99 N. Y., 333.

The disregard of this distinction, a distinction which no well considered authority denies, has been the source of nearly all the doubts and discrepancies in the state

ment of the rule of damages in actions of deceit. Indeed, it is submitted with all possible deference, that it was the disregard of this distinction which led the Court in *Smith* v. *Bolles* to make some unnecessary statements, which are at variance with the mass of authority already cited.

The right, in a case of false representations, to recover the money consideration paid —as such—rests only on the right of rescission. No doubt, there will at times be a case, where a purchase had been made of property which was absolutely worthless, where it will happen that the money paid is, in that particular case, equal to the damage from the deceit. In such cases, however, the money consideration merely happens to be the equivalent of the damage, for the reason that it happens to be equal to the value as represented; and it is, therefore, the equivalent of the difference between the represented value, and zero—which is the actual value. Nevertheless the law still is, that the money consideration—as money consideration—can be recovered only on the basis of rescisson. It cannot, therefore, ordinarily, be recovered in an action for deceit. For that action, as before stated, rests on an affirmance.

In some cases, too, confusion may have arisen from the circumstance that the contract price is admissible *as evidence*, of the value of the thing as it is represented. That it is evidence, but not conclusive evidence, on that point, is laid down in several cases, which nevertheless affirm the rule for which we contend.

Carr v. *Moore*, 41 N. H., 131.
Estell v. *Myers*, 56 Miss., 800.
Lunn v. *Shermer*, 93 N. C., 164.

So it has often happened, in cases where the distinction was not clearly brought out, that the contract price

and the represented value have been used as convertible terms. Such a case was

Sherwood v. *Sutton*, 5 Mason, 1,

of which the headnote states the rule of damages precisely as we are here contending for it; while from the opinion of Mr. Justice STORY it might seem that the contract price was the basis of the estimate of damages which he there allowed. Of the same class was the case of

Weybrick & Co. v. *Harris*, 31 Kansas, 92,

in which the opinion of the Court by Mr. Justice BREWER states the rule in both forms. It is perfectly apparent, however, that the learned Justice did not intend to sanction any departure from the established rule, which he stated as follows:

"If the vendor knows nothing of the contracts made by the vendee or the specific purpose for which the property is intended, and knows simply that the purchaser is seeking for an article of the kind and quality named, his liability is limited to the *difference between the value of the article actually delivered and that of the article which the parties intended to purchase and contract for.*"

III.—This distinction between the two remedies being borne in mind, we respectfully submit, that in the class of cases, where the defrauded vendee exercises his well established legal right, to retain the property and recover his money damage, especially in cases like the one at bar, where by reason of the complete success of the fraud no other course is possible, the only rule of

damages, which will work out justice, which will place the entire transaction on the basis contemplated and intended by the parties themselves, and will give the most precise estimate possible, of the precise money damage intended by the guilty party, is the rule established by a long and unbroken line of authorities down to *Smith* v. *Bolles;* those authorities all resting on the principle stated by this Court in that case as the controlling principle, which this Court had no intention of overruling or questioning.

1. The rule in actions for deceit is precisely the same as in cases of warranty.

The difference between the two cases, so far as concerns this point, is only one of form and pleading.

Schuchardt v. *Allens*, 1 Wallace, 359.
Williamson v. *Allison*, 2 East, 446.

In the case of a mere contract of warranty, made honestly, where property sold is warranted—to be of a certain quality, the rule is uncontroverted; the measure of damages, on a breach of such a contract, is the difference between the actual value of the property received, and the value of the property as warranted. In other words, the defendant is compelled to make good his statements. That is the case, where the misrepresentation has been honestly made, as matter of contract.

In cases of deceit, where the ground of the liability is a representation wilfully false, made for the express purpose of deceit and fraud, the rule should not be more favorable to the wrongdoer than it is to the party who merely honestly makes a contract, which he afterwards fails to perform.

It must be conceded, that the wrong accomplished is precisely the same in both cases. It must be conceded, also, that the wrong intended is precisely the same in both cases. The argument of the learned counsel then

amounts to this: That the rule as to damages should be more favorable to the party who is guilty of deliberate fraud and deceit, than it is to one who merely honestly fails to perform a contract.

This argument goes too far. No Court has ever held, that in such a case the party deceived was deprived of all remedy. The only possible controversy on the point of damages, in such a case, must be as to their measure. As to that point, it is quite apparent that the injury is the same. It s also apparent that the injury is accomplished by substantially the same act. We fail therefore to see any reason, why the rule of damage should be at all different in the one case from what it is in the other. In both cases the intent of the party is the same. The result accomplished is the same. The loss inflicted is the same. The rule of damage should be the same.

2. The rule, and its reason, are stated in the following opinions of the Massachusetts Supreme Court, the New York Court of Appeals, and the Supreme Court of Kansas.

Morse v. *Hutchins,* 102 Mass., 439. Tort for deceit, GRAY, J. "The rule of damages was rightly stated to the jury. It is *now well settled* that, in actions for *deceit or breach of warranty,* the measure of damages is the *difference* between the *actual value* of the property at the time of the purchase, and its *value if the property had been what it was represented or warranted* to be. (Citing Stiles *v.* White, 11 Met., 356. Tuttle *v.* Brown, 4 Gray, 457. Whitmore *v.* South Boston Iron Co., 2 Allen, 52. Fisk *v.* Hicks, 11 Foster (N. H.), 535. Woodward *v.* Thatcher, 21 Verm., 580. Muller *v.* Eno, 4 Kernan, 597. Sherwood *v.* Sutton, 5 Mason, 1. Loder *v.* Kekule, 3 C. B. (N. S.), 128. Dingle *v.* Hare, 7 C. B. (N. S.), 145. Jones *v.* Just, Law Rep., 3 Q. B., 197.) *This is the only rule which will give the purchaser adequate damages for*

not having the thing which the defendant undertook to sell him. To allow to the plaintiff (as the learned counsel for the plaintiff argued in this case) *only the difference* between the *real value* of the property *and* the *price* which he was induced to pay for it, would be to make any *advantage* lawfully secured to the innocent purchaser in the original bargain *inure to the benefit of the wrongdoer;* and in proportion as the original price was low, would afford a *protection to the party who had broken,* at the *expense of the party who was ready to abide by the terms of the contract.* The fact that the property sold was of such a character as to make it *difficult to ascertain with exactness* what its *value* would have been *if it had conformed to the contract* affords no reason for exempting the defendant from any part of the direct consequences of his fraud. And the *value may be estimated as easily in this action as in an action against him for an entire refusal to perform his contract.*"

Krumm v. *Beach,* 96 N. Y., 398, which was an action for deceit on a sale of land:

"The measure of damages in such a case is *full indemnity to the injured party;* the entire amount of his *loss* occasioned *by the fraud.* (*Dimmick* v. *Lockwood, 10 Wend., 105; Wardell* v. *Fosdick, 13 Johns., 325, and, Whitney* v. *Allaire, 1 Comst., 305-6.*) The first of these cases plainly points out the *difference* between actions for a *breach of covenant* and those founded upon *fraud.* In the *former* the *damages* are always bounded by the *consideration* and interest, which *often fall short of full indemnity;* a rule said to be founded "upon considerations of public policy without reference to the actual damage sustained by the party." (*Whitney* v. *Allaire, supra*); "but where *fraud* is established, *full and complete indemnity* is awarded. That full indemnity *may go beyond the consideration paid.*

The purchaser of land, as of other property, has a right to make a good bargain if he can, provided only that he deals honestly. Often *the profit secured above the price paid is the sole motive for the purchase,* and where there is an exchange of lands to some extent, one dealing fairly may sell his own at a high price and secure another's at a low one. To the *entire benefit of his bargain he is entitled.* If there has been no fraud he would have had it; he *should not lose it because the other party had been dishonest.* The measure of damages, therefore, should be that adopted by the Court below; *the difference in value between the property conveyed and that which would have been conveyed had the property been as represented,* and the actual contract honestly fulfilled."

Tracy v. *Gunn,* 29 Kansas, 508, (1883). Action by vendee against vendor for damages for deceit on a total failure of title. The Court say, per Mr. Justice BREWER: "The second question is as to the measure of damages. Plaintiff in error claims that it was only *the price paid and interest,* while the Court admitted testimony as to the value of the property at the time of the deed, and rendered judgment for such value. * * * In breaches of contract to convey real estate, a peculiar distinction as to the measure of damages runs through the cases, and that founded upon the motive with which the vendor acts. If he acts in *good faith,* it is held that the *contract price* becomes the measure of damages, while if he acts *mala fide,* the vendee may recover the actual damages." The learned Justice then quotes and approves Field on Damages, §485; Sedgwick on Damages, p. 209, to the effect that law which aims to give to a party *all the damages which he has actually sustained."*

"It is enough for us to say that the doctrine seems to be clearly established, that is, founded on justice,

and that it is in harmony with the general rules of the law which aims to give to a party all the damages which he has actually sustained."

3. The universality of the acceptance of the rule is shown by the following line of authorities:

Whitney v. *Allaire*, 1 N. Y., 305, 312.
Miller v. *Barber*, 66 N. Y., 558.
Hubbell v. *Meigs*, 50 N. Y., 480, 491.
Pryor v. *Foster*, 130 N. Y., 171, 178.
Pierce v. *Tiersch*, 40 Ohio St., 168, 173 (1883).
Lunn v. *Shermer*, 93 N. C., 164, 170 (1885).
Shinnabarger v. *Shelton*, 41 Mo. App., 147, p. 157, 1890.
Gunther v. *Ullrich*, 52 N. W. Rep., 88 (Wis. Supm. Ct., 1892).
Wright v. *Roach*, 57 Maine, 600 (1870).
Williams v. *McFadden*, 23 Fla., 143, 149 (1887).
Herfort v. *Cramer*, 7 Col., 483, 491, 1884.
Foster v. *Kennedy's Admr.*, 38 Ala., 359, 1862.
Budlong v. *Cunningham*, 11 Ill. App., 28, 32.
Johnston v. *Beeney*, 5 Ill. App., 604.
S. C., 9 Ill. App., 64.
Antle v. *Sexton*, 32 Ill. App., 437, 440.
S. C., 137 Ill., 410, 415.
Drew v. *Beall*, 62 Ill., 164, 168.
Stiles v. *White*, 11 Met., 356.
Harvey v. *Hadley*, 87 Cal., 557.
Murray v. *Jennings*, 42 Conn., 12.
Thompson v. *Burgey*, 36 Pa. St., 403.
Stetson v. *Croskey*, 52 Pa. St., 230.
Bowman v. *Parker*, 40 Vermont, 410, 413-414.
Noyes v. *Blodgett*, 58 N. H., 502.

Gales v. *Reynolds*, 13 Iowa, 1.
Molberly v. *Alexander*, 19 Iowa, 162.
White v. *Smith*, 54 Iowa, 233.
Page v. *Wells*, 37 Mich., 415, 421.
Jackson v. *Armstrong*, 50 Mich., 65, 69.
Stockham v. *Cheney*, 62 Mich., 10, 14.
Campbell v. *Hillman*, 15 B. Monroe, 508 (Kentucky).
Estell v. *Myers*, 56 Mississippi, 800, 805-806.
Young v. *Filley*, 19 Nebraska, 543.
Long v. *Clapp*, 15 Neb., 417, 420.
Ansyln v. *Frank*, 8 Missouri App., 242, 248.
Tracey v. *Gunn*, 29 Kansas, 508.

4. The following were cases of warranty where the same rule of damages was applied:

Clare v. *Maynard*, 7 C. & P., 741.
Walker v. *France*, 112 Pa. St., 203, 211.
Seigworth v. *Leffel*, 76 Pa. St., 476.
Jones v. *Just*, L. R., 3 Q. B., 197, 200-201.
Callanan v. *Brown & Co.*, 31 Iowa, 333 (341).
Maxted v. *Fowler*, 94 Mich., 106.
Tutile v. *Brown*, 4 Gray (Mass.), 457.
Whitmore v. *So. Boston Iron Co.*, 2 Allen (Mass.), 52, 60.
Peterkin v. *Martin*, 30 Louisiana Ann., 894.
Foster v. *Baer*, 7 Louisiana Ann., 613.
Slaughter v. *McRae*, 3 Louisiana Ann., 455.

5. So far as we are aware, down to the decision of *Smith* v. *Bolles*, not one well considered opinion can be found, coming from any court of authority, where there has been, in the language of Mr. Justice CURTIS, in *Carroll* v. *Carroll's Lessee*, 16 Howard, 275, "an application of the judicial mind to the precise question," where this established rule has been so much as called in question.

Peek v. *Derry*, Law Rep., 37 Chanc. Div., 541, on which the defense so strongly depended on the argument in the court below, as establishing a different rule in England, is not at variance with the established rule. An examination of the record in that case shows that, on the hearing below the action was dismissed, and, consequently, the question of damages was there neither argued nor considered. On the appeal, too, the questions which were the subject of the main discussion by counsel concerned only the right of the plaintiff to any recovery whatever. *Prior to the rendering of the opinion of the Appellate Court, the arguments of counsel on the appeal made no allusion to the rule of damages.* But Lord Justice Cotton, in reversing the decision below, added, at the end of his opinion, a paragraph on the question of damages. In that paragraph he said that the plaintiff would be entitled to recover "the difference between the sum given for the shares and the value of the shares." Evidently, that opinion went on the assumption, that the "sum given" was—in that case—equal to the value represented; and, consequently, a recovery on that basis—in that case—would, in substance and effect, conform to the established rule.

Thereafter (p. 590) the question of damages was argued. But the only point of substantial controversy on the later argument was, not as to the measure of damages, but the date, at which the measure should be applied.

Thereupon the Court said (p. 591): "One rather difficult point was *omitted in the argument.* * * * It is one of considerable difficulty. The question which arose was this: There *being no evidence which would really fix the loss,* we thought there ought to be an inquiry; but the *question was to what period ought that inquiry to refer?*"

That was really the only point considered, and decided, in *Peek v. Derry.*

Obviously that case, like many others, was one where the special facts led both counsel and Court to ignore the general rule. And it is quite obvious, that neither Court nor counsel had any intention of questioning the established rule.

There are many such cases. Many cases, then, can be cited, where, for one or another reason, the well established general rule has been inapplicable, or has not been invoked.

But we find *no well considered case,* where the rule, when invoked, and when applicable, has been denied, or even questioned.

Cooper v. *Schlesinger,* 111 U. S., 148, was not a case where the Court gave the question of damages a judicial consideration. The Court simply *held,* that the rule stated in the charge in that case was substantially in accordance with the request of the plaintiff in error, and therefore that the plaintiff in error was not prejudiced by the rule as there stated. The case, therefore, is not an authority.

6. The established rule is the only one which will carry into effect the controlling principle, as it is stated by our learned opponents, by all the authorities, and by this Court in *Smith* v. *Bolles;* that is, that the recovery is to be of "such damages as naturally and proximately resulted from the fraud;" or "the natural and necessary result of the false representations."

Brief of plaintiff in error, pp. 3 & 8.

We accept, without hesitation, these statements of the principle underlying the rule.

Let us now see how the principle can be worked out in practice.

(*a.*) In cases of rescission, where the purchased property is returned, there is, no doubt, the logical legal basis for a recovery of the money paid—as such.

(*b.*) In actions for deceit, however, where the property purchased is retained, where, consequently, the damage must be limited to the loss caused by the deceit, it is easily seen, that the money paid, as such, affords no criterion of the resulting damage. Take a simple case, the purchase of a farm, represented, among other things, to contain two hundred acres of rich intervale; in fact, containing only one hundred acres of such land. The fraud proved is only the misrepresentation of the one fact of quantity. The damage recoverable could legally be based on only that one misrepresentation. Although a rescission would entitle the purchaser to recover the entire consideration, yet his common law action of deceit, based on a retention of the property, would, very clearly, entitle him only to the difference in value between a farm containing two hundred acres, and one containing one hundred acres, of intervale; in other words, to the difference between the actual value and the value as represented.

So, too, in the case of a gold mine. Take the case where the vender has falsely represented, that the ore in the mine lies in a continuous unbroken vein, running a certain number of ounces of gold to the ton, with a certain number of tons of ore of a particular grade actually "in sight"; the fact being, that the vendor has for years been working the mine, so as to leave considerable stretches of the richest ore exposed to sight, and has filled up long spaces of the vein which were completely barren, so that they could not be discovered on any practicable examination. Suppose, in such a case, that the purchaser, after his purchase, has taken out large quantities of poor ore and worthless dirt, in a fruitless search for ore that will pay. A return of the property in its original condition, in other words rescission, has been made impossible, by the very action which the vendor intended, the removal of large amounts of ore by the purchaser.

In such a case, what rule can possibly be devised, other than the old established one, which will fix the damage

"proximately resulting" from the deceit? The consideration paid, together with the money spent in development, may be very large. The difference, however, between the actual value of the property and its value upon such representations as a jury finds were false, may be very slight. In a few exceptional cases, it may be possible to recover money spent in the search for the ore falsely stated to have been in the mine. But, in the general run of cases, can it be reasonably contended, that the purchaser can recover his money expenditure—in an action for deceit? No doubt, the fraud perpetrated gave him his other right—that of rescission; and, *if a rescission were still possible*, he would be entitled, on a rescission, to recover the consideration paid—as such. In the action for deceit, however, his right is only to the above stated difference.

(*c.*) Careful consideration will show, moreover, that the established rule is the only one that will effectuate the intention of the parties to the transaction, as expressed by themselves, and that any other will put the transaction on a basis which the parties themselves never contemplated.

Assume a case where, on the representations made, the value of the property sold as represented is twenty-five thousand dollars. But its actual value is only fifteen thousand. For their own good reasons, the parties make a sale at fifteen thousand. In other words, the price paid happens to be precisely equal to the real value. The purchaser believes the representations; in other words, he believes the value to be twenty-five thousand dollars. Such is the statement of the seller, on which the purchaser relies, and on which the seller intends him to rely. In other words, the seller intends the purchaser to believe, that he is getting a property worth twenty-five thousand dollars at the price of fifteen thousand. The purchaser makes the purchase by reason of that belief: and the belief is caused by the wilful fraud of the seller.

The transaction intended by the parties goes on the very basis, that the purchaser is to have a profit of ten thousand dollars. That is the result intended, by the transaction as expressed by them.

Under the rule for which our opponents contend, there can be no recovery whatever, because the consideration paid is no more than the actual value. In other words, the buyer must lose his profit of ten thousand dollars, to which he was entitled under the transaction, as expressed, and intended, by both parties; a profit which was evidently directly in the contemplation of both parties, as the inducement to the purchase.

The buyer, in such a case, is justly entitled to the value, which he believed he was getting; that belief being created by the seller, who knew the real facts, and produced the belief by the perpetration of a wilful fraud. The seller is justly condemned to make good to the buyer the value which he stated to the buyer, falsely, with the intent to deceive, which constituted the very basis of the transaction.

The precise fraud, intended by the guilty party, was the sale of a property actually worth only fifteen thousand dollars, on the belief of the purchaser, that he was getting a property worth twenty-five thousand dollars. No rule can be devised, which will work justice, in that case, or in any case of wilful deceit, except the rule that the guilty party shall be compelled to make good his statements. On the other hand, the rule for which our opponents contend, necessarily has for its result the protection of the party committing the fraud, and the protection of the precise fraud, which the guilty party intended.

(*d.*) If it be said, that the result of the old established rule is to give the purchaser prospective profits, the answer is, that such is the intention of the parties to the transaction.

The seller says, in effect, "I am selling you a property worth twenty-five thousand dollars, at such a price as will ensure you a profit of ten thousand." That is the precise inducement, held out to the purchaser, on the basis of which he makes the purchase. That precise profit is exactly what the transaction— as expressed between the parties—gives him. No other rule will effectuate the transaction on the basis contemplated, and intended by the parties.

We accept unhesitatingly the principle laid down by the Court in *Smith* v. *Bolles,* which we understand to be contained in the extract made by the Court from Mr. Greenleaf and from the opinion in *Crater* v. *Binninger,* 33 N. J. L., 538, 513, in the following words:

"The damage to be recovered must always be the natural and proximate consequence of the act complained of," says Mr. Greenleaf, and in the language of Chief Justice Beasley "That test is that those results are proximate which *the wrongdoer from his position must have contemplated as the probable consequences of his fraud or breach of contract.*

Without questioning here the soundness of the application of this principle to the facts which appeared upon the record in the case of *Smith v. Bolles,* we state again that we accept without hesitation the statement of that principle there given; and we maintain that the only possible way in a case like the one at bar of estimating "the natural and proximate consequences of the act complained of," and of ascertaining "those results which the wrongdoer from his position must have contemplated as the probable consequence of his fraud," is to compel him to make good the difference between the facts and his false representations. That difference is, we maintain, the precise result which he must have contemplated as the probable consequence of his fraud.

He understood that the plaintiffs really expected that they were getting what he represented; at the same time he had positive knowledge that they were not getting the property as he was representing it but were getting it only as it existed in fact. The precise consequence, the proximate consequence, then, of his wrongful act, which he intended, which he contemplated, which he knew he would accomplish by the precise fraud that he committed, was to induce the plaintiffs to pay for a property having the features that he represented; when, in fact, they were getting a property which was very different. The only possible way of redressing that precise wrong is to hold him responsible for that precise difference—between the value of the property as it existed in fact, and the value of the property according to his representations. No way can possibly be devised, we submit with all deference, which will accomplish that result except to apply the principle stated in *Smith v. Bolles*, as it was applied in the case at bar by the charge of the Court following the long line of authorities in which that principle had been applied in many previous cases.

In the case supposed the "result which the wrongdoer from his position must have contemplated" is the loss of that profit—of ten thousand dollars. That is the precise loss "contemplated," by the party committing the fraud, as the consequence of his fraud. He intends that precise damage. Both buyer and seller intend the transaction to go on the basis of value represented. That being so, we respectfully submit, that a court has no option, but to enforce the transaction on the basis intended by the parties. When the parties both intend a sale at a price less than the value as stated by the seller, the courts have no right—to put the transaction on any other basis than the one on which it is placed by the parties themselves.

It is wholly inaccurate, to apply the term "speculative," in its commercial sense, to the plaintiff's recovery

under the established rule. A "speculation," in that sense, involves the purchase of property with a view to its advance in value at a future day. Under the established rule of damages, the comparison of the two values —"represented" and "actual"—is made as of the same point of time, the date of the sale. The plaintiff's recovery is for the difference between the two at that date.

Nor does the established rule involve any question of future prices on the "market." The rule for which we contend, has no concern with "market" value—as such—but only with "actual" value.

The term "market value" as used in the charge, and on the trial, meant nothing more nor less than "money value."

(*e.*) The contention of the defendant that the established rule allows "contingent," or "speculative" profits, has no sound foundation.

The recovery, under the rule, it must be repeated, is of the difference between actual value and represented value, *both taken on the same date.*

The false statements submitted to the jury, in every such case, concern only matters of fact. So the certificate in this record states as to this case. How was it possible to devise anything more saturated with statements of fact—than the so called Burnham report? If, thereafter, it appears that, by what may be termed mineral forgery, he made an accurate examination of the mine impossible, and thus deceived his vendees by his false statements of mere quantities, of mere figures, how was it possible more completely to exclude from the jury's computation of damages the element of the "contingent," or the "speculative," than by the rule, that the damage resulting from the deceit is the difference, be-

tween the value on the false statement, and the value on the fact? How is it possible, to "make the punishment fit the crime" with greater accuracy?

A jury "speculates" no more under this rule, than it is compelled to do in any case involving complicated questions as to the values of land; or, indeed, than it does in many cases of a valuation of personal property; or in cases of many kinds, which are decided on the opinions of experts.

It is precisely as easy, moreover, for a jury to estimate represented value, as actual value. Both are estimated, by experts, *on facts assumed*—which is merely one method of description. In estimating actual value, so-called, the land is described—by witnesses; then, on those facts assumed, that is, on that description, experts give their opinions, and, on those facts assumed, with the opinions, the jury forms its conclusion. In estimating represented value, the case is submitted in precisely the same way, on facts assumed; that is, on a description, of the same kind as that used in submitting the question of actual value, (the facts assumed being the facts falsely represented); the experts thereupon give their opinions on *that* description; and the jury thereupon form their conclusion as to *that* value. The method is precisely the same in both cases. The one involves just as much speculation, and conjecture, as the other. And no more.

Our opponents are compelled, by the necessities of their situation, to make an assault on the established general rule, under cover of an insinuation as to the character of the property purchased in this particular case.

It is quite evident, that the character of the purchased property, in any particular case, has no logical, or legal, connection with the general rule of damages for all cases. Even if, therefore, it were the fact, that the purchase in this particular case had been of a property more or less "speculative," that fact would have no bearing whatever on the general rule of damages, either as to its principle, or its statement.

If, therefore, we assume, that the purchase of this gold mine was, to some extent, "speculative," the question still remains, what was the reasonable rule, the best rule practicable, under which a jury should make its estimate of the damage resulting from a wilful deceit, as to *matters of fact.* For, of course, misrepresentations as to matters of opinion were not submitted to he jury.

The record in his case, moreover, is, that there was "sufficient proof to enable the jury to determine," both the "represented" value, and the "actual" value—as matters of fact.

It may be conceded, that the established rule allows a jury a wide latitude of estimate. But that constitutes no valid objection to the rule. That latitude is unavoidable. That possibility exists in many cases; in cases of damages for loss of time; damages to the person; to the feelings; injuries to real estate; and in cases of many other classes. The rule in actions of deceit is no mor difficult of application than in many others.

(*f.*) Nor does the contention of the defendant below, that the rule gives no credit or allowance to the defendant for the value of the property purchased, rest on good grounds.

On the contrary the rule does precisely that. It does make an allowance to the defendant for the real value, when it directs the jury to assess damages at the difference between the real value and the value as represented. The fact that the rule makes that allowance constitutes one of the chief reasons on which the rule rests.

On the other hand, one of the chief objections, the rule which allows a recovery only of the money paid, is that it gives no consideration whatever to value, either to the value in fact, or the value as represented. .It simply allows a purchaser to rescind. It does not rest upon the basis of awarding the actual damage caused by the proved deceit. It simply gives to the purchaser the right to abrogate the entire transaction. In other words,

it allows, to a party who has been deceived by false statements, his other remedy—rescission. In short, it is in cases of rescission, and only in cases of rescission, that the purchaser has the right to recover the money consideration paid—as such.

And in cases where the success of the fraud has made recission impossible, full redress for the wrong committed is possible only under the old established rule.

(*g.*) The established rule works out justice to both parties, as perfectly as possible.

The contract of sale stands. The plaintiff retains the purchased property. The defendant retains the purchase price. The defendant is then credited with the actual value, and is required simply to make good his false and fraudulent representations, by paying to the plaintiff the difference between the actual value and the value represented.

Especially in cases, where the deceit alleged is complex, as was the fact in the case at bar, where it was a combination of representations and acts, of acts which made the verification of the representations impossible, it is quite appaernt that the established rule is the only one practicable, for the reason that the fraudulent acts charged may not all be found by the jury; and it is only for such as the jury find to be established on the evidence, that damages can be allowed. It is obvious, that to allow in all such cases a recovery of the money paid would be quite contrary to the principle which constitutes the foundation of the rule.

These considerations are the ones which have led the ablest jurists in England and the United States, to establish, and adhere to, the same rule in cases of deceit, which they all follow in cases of warranty, unless the intention was to lay down a wholly different rule in *Smith* v. *Bolles*.

IV.—The Court, in *Smith* v. *Bolles,* had no intention of departing from the established rule.

A careful examination of the record, with the authorities cited, will show that the Court only intended in that case to deny the right to remote and doubtful possible profits, which could not reasonably have been contemplated by the parties.

1. The opinion is of course to be read after the method recently laid down by the Court itself in *Pollock* v. *Farmers' Loan and Trust Company,* 157 U. S., 429, by Mr. Chief Justice Fuller (at page 574).

"Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect to *decisions directly upon the points in issue.*

"The language of Chief Justice Marshall, in *Cohen* v. *Virginia,* 6 Wheat., 264, 399, may profitably again be quoted: 'It is a maxim not to be disregarded, that *general expressions,* in every opinion, are to be taken *in connection with the case* in which those expressions are used. If they *go beyond the case,* they may be respected, but *ought not to control* the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. *Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.*"

2. The opinion, throughout, makes not so much as an intimation, of any intention to depart from the long line of authorities which have been cited, or of the fact

that there were any authorities at variance with the language in the opinion; or of any intention to state any principle, or rule, that was new.

The learned Chief Justice, who wrote the opinion, made no reference to the unbroken line of authorities in Illinois. Mr. Justice Blatchford concurred in the opinion, making no reference to the unbroken line of authorities in New York. Mr. Justice Gray, who, as Chief Justice of the Massachusetts Supreme Court, had written the opinion in *Morse* v. *Hutchins* above quoted, concurred, and made no reference to the unbroken line of authorities in Massachusetts.

So that it is quite inconceivable, that either the learned Chief Justice, or either of those Associate Justices, or any other member of the Court, could have had any intention of departing from the old established landmarks, in this branch of the law.

There are, no doubt, many cases, to which the rule can have no application. Such were the cases cited by the learned Chief Justice in the opinion.

One was a case where the plaintiff was not a purchaser of the entire property, as to which the false representations were made, but had acquired only a fractional interest in a speculative venture, on a false representation as to the price which the seller had originally paid for the entire property. Another case held, merely that the plaintiff could not recover "purely speculative benefits." Another was the case of misrepresentations as to the value of land, on which the plaintiff had made a loan; and his damages were limited to the loss on his loan. Another held, that a party, who was induced by fraud to enter a firm, and pay certain firm notes, could recover only the amounts he was compelled to pay.

Stated more in detail, those cases are as follows:

Crater v. *Binninger*, 33 N. J. Law, 513, decided only that there was error in the charge in that case, and that the established rule was not applicable to the facts of that case.

In *Crater* v. *Binninger,* the plaintiff was induced to enter into an oil land speculation by the representation of the defendant that the land cost $28,000. $4,000 was required for a working capital, and the defendant purchased an eighth for $4,000. He afterwards paid an assessment of $500 for the purpose of furnishing additional capital. A portion of the property was sold for $16,000. The actual cost of the property to the defendant was $18,000. The Court below ruled that the plaintiff was entitled to recover the difference between his investment ($4,500) and the actual cost of the same to the defendant ($2,000) viz., $2,500 *without taking into account the value of the land remaining unsold.* The defendant contended that the measure of damages was one-eighth of the real difference between the "cost" and the represented cost (not including the $500); and on appeal it was decided that the damages arising from a false representation are not necessarily limited to the difference between the actual value and the represented value in all cases. In the opinion of the Chancellor, on page 522, it is stated that the difference between the actual value and the represented value is in many cases the measure of damages; and *Stiles* v. *White,* 11 Met., 356, and *Cary* v. *Gruman,* 4 Hill, 627, are cited by the Court with approval. In each of the two last named cases the measure of damages was held to be the difference between the actual value and the value as represented. In *Crater* v. *Binninger* the Court lays stress upon the fact that the plaintiff was *not a purchaser of the property,* but was induced by the representation in question to embark in a speculative enterprise, which would naturally result in further investment and loss.

Fitzsimmons v. *Chapman,* 37 Michigan, 139, decided only that "damages are not recoverable for the loss of *purely speculative benefits* that cannot be estimated by any certain standard."

Here, again, we come upon a real point, on which the Chief Justice was really laying stress, that of possible prospective profits.

That the Michigan Supreme Court did not intend in that case to depart from the established rule in actions of deceit is clear from the fact that in the same volume of its reports we find the following statement of the rule by Judge COOLEY in the case of *Page* v. *Wells*, 37 Mich., 415: "If the plaintiff was induced to purchase lands on representations which proved to be untrue, the measure of his loss, as it seems to us, would be perfectly plain, and would be reached by an answer to the following question: *How much less is the land worth as it is, than it would have been if its condition and quality had been as represented? This is the only safe and only reasonable rule.*"

Horne v. *Walton*, 117 Illinois, 130, was a case where the rule was clearly inapplicable, as the misrepresentation was as to the value of land on which the plaintiff had made a loan. The property was properly limit d to the amount lost on the loan. The plaintiff was not a purchaser of the land. The Court in that case, at page 134, expressly recognize the soundness of the established rule. But they say, "this instruction was properly refused, as being *inapplicable to the facts of the case.* Where there has been a *sale* of land, and fraudulent representations have been made as to its value or quality or condition, the measure of damages is, *undoubtedly,* the *difference* between the *actual value of* the land and the *value* of *it,* as it was *represented* to be at the time of the sale. In this case there was *no sale,* but a *loan.*"

When examined more closely it will be seen that the rule there laid down is really the same which we are contending for. In other words, what a lender of money intends is the certanty of getting back his money, that is security for his loan. He can never get more than the amount of his loan. From that fact alone, the represented value of that which he receives is fixed. In this respect, the position of the purchaser of lands is

quite different, because he is entitled to the land's entire value. But the measure of damages in an action of deceit is the same in both cases. This is brought out clearly in the opinion of Judge COOLEY in a precisely similar case, the case of a loan on inadequate security, induced by fraudulent representations as to the value of the security. The damages were held to be the difference between the loan and the actual value of the security.

Briggs v. *Brushaber*, 43 Mich., 330.

Judge COOLEY there says: "In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was marketable commodity, and she lost by the fraud itself the *difference* between the market *value* of that which she *received* and that *which she was to have under the arrangement.*"

Schwabacher v. *Riddle*, 84 Illinois, 517, merely holds, that one who has been induced by fraud to become a member of a firm, and is thereafter compelled to pay a portion of certain firm notes, can recover only the damage resulting from the fraud. No other point was raised, or decided. That, too, was not the case of a purchase of property. The Court say: "So much of the loss as was sustained in consequence of the misplaced confidence in Fosbender's solvency alone, is most clearly not chargeable to the other parties. If appellee is entitled to recover, it is for the injury done him by the defendants, and not for injuries sustained in consequence of circumstances over which they had no control."

Slingerland v. *Bennett*, 66 N. Y., 611, decided only that in any action for breach of warranty as to the responsibility of the maker of a note given to plaintiff on a sale of a horse, the plaintiff could not recover the costs of a judgment on the note, but only the amount

of the note with interest. Not so much as an allusion is made to the established rule on sales.

It is apparent, therefore, that not one of the authorities cited by the Chief Justice questions the established rule, that several of them expressly assert it, and that they all go virtually on some other question, of what was or was not damage resulting from the fraud in that particular case.

3. The decision in *Smith* v. *Bolles*, rightly interpreted, must be held to be a decision, only that the measure of damages is not the difference between the represented value and the contract price.

At the same time, the opinion states the established law, that there is no right, in such a case, to recover remote possible prospective profits.

The position taken by the plaintiff in error in that case, as appears from his brief in the record, was as follows:

The Court charged the jury that the measure of recovery is generally the difference between 'the *contract price* and the *reasonable market value*.' We submit that this is not the rule. * * * To test the effect of the rule given, take an example. Suppose testimony had been given tending to show that this stock was worth $5 a share, and that it would have been worth $10 a share had it met the representation of the defendant. The measure of damages then would have been $5 a share. And yet the Court said to the jury that the damages were practically $8.50 a share in the case supposed—the difference between the *contract price $1.50 and the reasonable market value if the property had been as represented*, namely $10 a share."

The opinion of the Court must be read in connection with the contention just stated.

The opinion reads as follows:

"The bill of exceptions states that the Court charged the jury 'as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case,' that 'the measure of recovery is generally the difference between the *contract price* and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been in the evidence before you.'

"In this there was error. The measure of damages was *not* the *difference* between the *contract price* and the reasonable *market value* if the property had been *as represented* to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff *might have gained is not the question*, but what he had *lost* by being *deceived* into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the palintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as *naturally and proximately resulted from the fraud.* He was bound to *make good the loss sustained,* such as the moneys the plaintiff had paid out, and interest, and any other outlay *legitimately attributable* to defendant's *fraudulent conduct;* but this liability did *not* include the *expected fruits of an unrealized speculation.* The reasonable *market value,* if the property had been as represented, afforded, *therefore,* no proper element of recovery.

"*Nor* had the *contract price* the bearing given to it by the Court. What the plaintiff *paid* for the stock *was properly put in evidence, not* as the *basis* of the *application of the rule* in relation to the difference between the contract price and the market or actual value, but as establishing the *loss* he had *sustained* in that particular. If the stock had a *value in fact,* that *would necessarily* be applied in *reduction* of the *damages.* 'The damage to be recovered must always be the *natural and proximate consequence of the act* complained of,' says Mr. Greenleaf, Vol. II., § 256; and 'That test is,' adds Chief Justice Beasley in Crater *v.* Binninger, 33 N. J. L., 513, 'that those results are *proximate* which the wrong-doer from his position must have contemplated as the *probable consequences of his fraud* or breach of contract.'"

It is plain, therefore, that the Court intended to decide the case on the principles here stated as the foundation of the rule.

The rule stated in the Court below did give to the plaintiff the "expected fruits of an unrealized speculation." Therein it differed from the established rule. The established rule works out the opposite result, the one which should be worked out, according to the principle stated by this Court in *Smith* v. *Bolles.*

We do not contend, that the "*market* value" is one of the elements in estimating the damage resulting from a proved deceit. Our contention is, that the element is the *actual* value. The market value is, no doubt, often the easiest way of proving actual value. But there are many cases, where there is no such thing as "market value." In every case of deceit, however, the main element in the computation of damage is "actual" value. So it is stated by Lord Cotton, in *Peek* v. *Derry,* as stated on our opponent's brief (p. 9).

The fact is, that our opponents have not correctly apprehended our position. The position for which we contend is, that the measure of damage is the difference between represented value and "actual" value.

V.—No argument of weight can rightly be drawn from the fact, that some of our courts, especially the Federal Courts, have followed *Smith* v. *Bolles* since the decision was promulgated. That result was to be expected. Those cases, we respectfully submit, can have no weight as authority, for the reason that they have themselves been mere submissions to authority.

Even with those decisions against us, however, we ask the Court to make a comparison, as to weight of authority, between the list of cases which we present in support of the established rule, and those that our able and diligent adversaries have been able to discover, in opposition to it.

But we do most strenuously insist, that, under the present resulting situation, this Court should now give its decisive authority in support of the rule which was formerly free from any substantial controversy, the only rule which can be sustained on principle, on sound reason, and thus put an end to all doubts and discrepancies in this branch of the law.

VI—The rule of damages, then, being assumed to be the difference, between the value of the property in fact and its value as represented, as of the date of the purchase, we respectfully submit, that the only practicable means of enabling a jury to estimate that difference in value is by the opinions of experts.

Transportation Line v. *Hope*, 95 U. S., 297, 298.

St. Louis Co. v. *Edwards*, 78 Fed. Rep., 745.

Swan v. County of Middlesex, 101 Mass., 173. Opinion by Mr. Justice Gray.

In fact, this was the character of some of the evidence put in by the defence at fols. 1274-1277.

In addition to this evidence, however, the jury had before them all the facts offered by both parties, as to the dimensions of the ore body, the quantity and quality of the ore in the mine, and the subsequent product of the mine.

Especially, not one word of testimony was excluded as to value, which was offered by the defendant.

Swan v. *County of Middlesex,* 101 Mass., at p. 177, states the principle as follows:

GRAY, J.: "It is well settled in this Commonwealth that, when the value of real estate is in controversy, opinions of persons acquainted with its value are admissible in evidence. Those opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training or professional experience; but rather from necessity, upon the ground that they depend upon knowledge which anyone may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved. *Dwight* v. *County Commissioners,* 11 Cush., 203. *Shattuck* v. *Stoneham Branch Railroad Co.,* 6 Allen, 116, 117. *Whitman* v. *Boston & Maine Railroad,* 7 Allen, 316, and cases there cited. The same rule has prevailed in courts of authority in other States. *Kellogg* v. *Krauser,* 14 S. & R., 137. *Warren* v. *Wheeler,* 21 Maine, 484. *Clark* v. *Baird,* 5 Selden, 183. The knowledge requisite to qualify a witness to testify to his opinion of the value of lands may either be acquired by the performance of official duty, as by a county commissioner or selectman, whose duty it is to lay out public ways, or by an assessor, whose duty it is to ascertain the value of lands for the purpose of taxation; or it may be derived from knowledge of sales and purchases of other lands in the vicinity, either by the witness himself or by other

persons. *Dickenson* v. *Fitchburg,* 13 Gray, 546. *Whitman* v. *Boston & Maine Railroad,* 7 Allen, 316. *Russell* v. *Horn Pond Branch Railroad Co.,* 4 Gray, 607. *Fowler* v. *County Commissioners,* 6 Allen, 97. On the question of the sufficiency of the knowledge of the witness, much must be left to the discretion of the judge or officer presiding at the trial. *Paine* v. *Boston,* 4 Allen, 170. *Shattuck* v. *Stoneham Branch Railroad Co.,* 6 Allen, 117. When the matter in issue is the assessment of damages to land by the laying out of a public way, witnesses having the requisite knowledge may testify to their opinion of the comparative value of the lands immediately before and after the taking, and to the effect of the taking upon the value of the remaining land, by way of injury or benefit. *Dwight* v. *County Commissioners,* 11 Cush., 201. *Shaw* v. *Charlestown,* 2 Gray, 107. *West Newbury v. Chase,* 5 Gray, 421. *Dickenson* v. *Fitchburg,* 13 Gray, 546. *Shattuck* v. *Stoneham Branch Railroad Co.,* 6 Allen, 116, 117."

VII.—The opinions of experts, then, being the only practicable means of enabling a jury to estimate that difference in value, we next submit, that those opinions, in order to preserve to the jury its full function, can be best given in the form of answers to hypothetical questions—if, indeed, it is permissible to give them in any other form.

People v. *Lake,* 12 N. Y., 358.
Seymour v. *Fellows,* 77 N. Y., 178.
Dilleber v. *Home Ins. Co.,* 87 N. Y., 79.
Cole v. *Fall Brook Co.,* 159 N. Y., 59, 68.
Cowley v. *People,* 83 N. Y., 464.

Cowley v. *People,* 83 N. Y., 464, lays down the rule as to hypothetical questions, in these words, p. 470: "Another question is as to the admissibility of the hypo-

thetical questions put to medical experts sworn as witnesses. The claim is that a hypothetical question may not be put to an expert unless it states the facts *as they exist*. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The meaning of the word is, that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury; and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice."

VIII.—Upon these positions, we submit that the rulings of the trial Court as to the admission of evidence, were manifestly correct.

1. It being the law, that the opinions of experts must be given, in the form of answers to hypothetical questions, we submit, that there was no error in the rulings of the trial Court on that class of testiomony.

The errors alleged by the defense on this point mainly concern the testimony of Olcott. The answers to the positions of the plaintiff in error as to this testimony are as follows:

(*a.*) The decision as to the qualifications of an alleged expert, and on most other questions as to the testimony of experts, is a matter of discretion for the Court, and a mistake in such a decision does not constitute error.

***Stillwell Man. Co.* v. *Phelps*, 130 U. S., 520, 527.**

***Montana Railway Co.* v. *Warren*, 137 U. S., 348, 353.**

(*b.*) Hypothetical questions may assume any facts which the testimony has a "tendency" to support.

Cowley v. *People*, 83 N. Y., 464.
Stearns v. *Field*, 90 N. Y., 640.
Louisville Co. v. *Falvey*, 104 Indiana, 409, 413.
Dickinson v. *Fitchburg*, 13 Gray, 546, 556.

(*c.*) The testimony of the plaintiffs' experts conformed with complete accuracy to the Burnham report, and to the other facts proved by the evidence.

Opinion Court of Appeals, pp. 624-627.

(*d.*) The testimony of Olcott in the main amounted to nothing but mathematical computations.

Testimony Olcott, pp. 240-245.

(*e.*) The decision on the form of a hypothetical question must be largely left to the discretion of the trial Court.

Forsythe v. *Doolittle*, 120 U. S., 73, 78.

(*f.*) The points now urged by the defense are largely afterthoughts which were never fairly presented to the trial Court.

Opinion Court of Appeals, pp. 624-626.

2. The letters of Egan, written in confidence to his friends and associates, were admissible on the question of his intent, as tending to show whether he was the deceived or the deceiver.

The defense below was driven to the contention, that the deceit in the case was by Egan. The fact, that there had been a most remarkable and successful fraud by the defendant, was conceded in open Court by the learned counsel for defendant.

Opinion of Court of Appeals, p. 626.
Cross-examination of defendant, fols. 1011-1022.

The Egan letters, written from the mine, in confidence to his friends, while his examination was in progress, if admissible on no other grounds, were clearly admissible to prove Egan's state of mind.

The portions of the charge under which the letters were offered, to which no exception was taken, are at folios 1372-1374, and are as follows:

"It is not necessary for me to say that you must find affirmatively *that Egan was deceived*, at the very threshold of your consideration of the case. If he was not, that is the end of the case. If Egan deceived himself, or if Egan misrepresented the facts of his own volition, the defendant is not responsible, and never mind how much the plaintiffs may have been misled they have no cause of action. And now, was Egan misled?" * * *

"You may find that Egan started to the mine for the purpose of buying it; or that when he reached it and saw it he conceived the idea that it was the basis of a great speculation, out of which he could make money for himself. You may find, in view of some of the *letters that were written by him, almost at the threshold of his examination*, that he did not care very much whether the facts which had been stated in the Burnham report were true or not. You may find that he was thrown off his guard by the artifices which the defendant and Cheatham resorted to, and that he was led to believe what was stated to be true in the Burnham report and the report which he made himself. Now, this is a question for you to determine. Was he cheated or was he the cheat?"

We refer to the following authorities:

As to the admissibility of Egan's confidential contemporaneous communications to Platt and Morse, in the nature of informal preliminary reports, on the issue of his intent in making his later formal report;

Shrewsbury v. *Blount*, 2 Manning & Granger, 475,

in which on an action for deceit, the Court admitted in favor of the defendants their own contemporaneous conversations with one another on the question of their intent.

Greenleaf on Evidence, §108.
Beaver v. *Taylor*, 1 Wallace, 637.
Travelers' Ins. Co. v. *Mosley*, 8 Wallace, 397.
Mutual Life Ins. Co. v. *Hillmon*, 145 U. S., 285.
Russell v. *Frisbie*, 19 Conn., 205.

IX.—The objection that the plaintiffs could not recover the entire damage is quite without merit.

Opinion Court of Appeals, p. 623.

Whether under the New York Code or not, the plaintiffs were the only parties to the transaction with the defendant. They paid the entire consideration. The rights of other parties, not present on this record, are quite immaterial.

Plaintiffs' Exhibits 1-11, fols. 1474-1575.
Treat v. *Stanton*, 14 Connecticut, 445.
Western R. Co. v. *Nolan*, 48 N. Y., 513.

X.—Upon these positions, we submit, that the charge of the trial Court was the only one which would work justice to both parties, in any case like the case at bar.

1. It is well settled, that the charge of the Court need not follow the exact form requested by counsel; and there is no error, if the charge is correct in substance.

***White* v. *Van Horn*, 159 U. S., 3.**
***Erie Railroad Co.* v. *Winter*, 143 U. S., 60.**

2. The charge of the Court granted all that was correctly stated in the defendant's request.

That request read as follows (fol. 1357): "If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant; and *the value of the mine, if the same had been as represented, affords no proper element of recovery.* The value of the mine when the plaintiffs bought it, must be applied in reducing or extinguishing the plaintiffs' loss."

It is to be noted, that every single proposition in this request was really charged, excepting the one in italics, that "the value of the mine, *if the same had been as represented,* affords no proper element of recovery." The loss to be recovered, under the charge of the Court, was carefully limited to the loss actually resulting from the fraudulent acts and representations actually proved against the defendant. The defendant, under the charge as given, had a credit for the "value of the mine when the plaintiffs bought it."

We have then this singular position. The only clause in the request which was not granted, would have virtually directed the jury to leave wholly out of consideration the effect on the valuation of the purchased property, which was due to the defendant's fraud.

It would be difficult to devise a more complete demonstration, of the unsoundness of the contention of the defense. Their entire contention rests on the erroneous assumption, that the remedy in deceit is the same as that in rescission. We most respectfully repeat, that there is the cause of the entire difficulty, and that a momentary overlooking of that distinction was the source of the phrases in the opinion of *Smith* v. *Bolles,* which are inapplicable to the case at bar.

3. The impossibility, under any rule other than the one charged, of limiting the estimate of damage to such damage as actually resulted from the acts found by the

jury, is apparent from the following extract from the charge (Record, fols. 1376-1382):

"I shall content myself with directing your attention to some of the principal matters in respect to which it is said he was deceived.

"In the first place, it is said that he was deceived as to the *average width* of the pay streak, and that this was affected in part by the way the mine had been manipulated. It is said that he was deceived in respect to abandoned workings, and if he had discovered them, or they had been revealed, he would not have been induced to recommend the mine. It is said that he was deceived *in regard to the amount of ore which had been produced,* and the *value of the ore in the past history* of the mine. It is said that he was deceived as to the *true value* of the ore by a fraudulent mill run practiced upon him. And there are *other matters* in regard to which it is alleged he was deceived, outside of those which I may term the general geological conditions. Now, you will take up the *evidence as to these various issues,* consider them *one by one,* and determine whether *as to that one* there was *misrepresentation or* there was a *fraud* of any kind for which the defendant is responsible. Now, if Egan was deceived in some respects, but not in others, the question will arise to what extent the defendant is responsible to the plaintiffs, bearing in mind the proposition which I have stated before, that the *defendant is not responsible for any misrepresentations made by Egan to the plaintiffs, except those which he authorized or of which he was the author.*

"If you find that Egan was deceived, and that, in consequence of the deceits practiced upon him, the plaintiffs were induced to make this purchase, that *they were misled by the things which misled him,* then you reach the question of damages.

"The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented.

You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the *extent* that the plaintiffs have been *injured by one* of several misrepresentations, they are entitled to recover *for that;* that is, if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs.

"Now, *upon what particular facts stated in the Burnham report, or in the report made by Egan himself, did the plaintiffs rely?* Which of those *has been proved to be a misstatement for which the defendant is responsible?* You can consider the statements *separately or collectively.* If you find that they relied upon *all* of them and would not have been induced to enter into the contract except for their belief *in the truth of all of them,* then you can say, if you find that they are entitled to recover, that they should recover the difference between the value of the property as it would have been if *all those representations had been true* and as it proved to be. *On the other hand,* if you say that they did *not rely upon all* these representations, that it was *this one* or *that one* which may have been *influential,* then you are to determine how much the property would have been worth *if that particular representation had been true.* If that particular fact had existed as represented, and then the measure of damages would be the difference between *that value* and the *value* of the property *as it proved.*"

XI.—The question certified by the Court of Appeals should be answered in conformity with the positions here advanced, and, if this Court takes any further action, there should be a judgment of affirmance of the judgment below.

Respectfully submitted,

ALBERT STICKNEY,

Of counsel for defendants in error.

Supreme Court of the United States.

No. 8.—October Term, 1900.

James M. Sigafus, Plaintiff in Error, vs. Dudley Porter et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[October 29th 1900.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought to recover damages for deceit alleged to have been practiced by Sigafus, the plaintiff in error, upon Porter, Hobson and Morse, the defendants in error, in the sale by the former to the latter of a gold mine in California, known as the Good Hope Consolidated Gold Lode Mining Claim (consisting of the San Jacinto and Good Hope Quartz locations), and as the Annex, adjoining the Good Hope mine on the south.

The complaint alleged that the defendant Sigafus was President of the Good Hope Consolidated Gold Mining Company, a corporation of California possessing the legal title to the property in question, and that with the exception of a few shares standing in the name of his son-in-law he owned its entire capital stock, and was in fact the sole beneficial owner of the mine and the lands and property appurtenant thereto;

That prior to December 28th 1893, the defendant representing his own interests and those of the company as well as those of his son-in-law, and acting by one William H. Griffith, entered into negotiations with the plaintiffs for the sale of the mine, mining claims and their appurtenances;

That in the course of such negotiations the defendant falsely and fraudulently and with intent to deceive and defraud the plaintiffs, represented to them that the lands and mines and mining claims contained a large and valuable vein of gold-bearing ore, large and valuable deposits of gold, and that all of the gold-bearing quartz would average in milling more than $16 per ton;

That he laid before the plaintiffs a false and fraudulent report or statement in writing in regard to the lands and mines and mining claims, made by one Burnham, who was therein represented to be an independent and disinterested mining engineer and expert, and to have made a careful and complete examination in the premises, which report or statement in substance stated that the pay streak in the mine had an average width of two feet, that 2.434 tons of ore from the mine had been milled and yielded an average value in gold of $23.78 per ton, that the mine had been operated

and the ore taken therefrom had been milled for two years or more and had yielded, in gold, an average of $23.78 per ton; that the value of the bullion produced from the mine for the twelve months ending with January 1892, inclusive, was $57,879.78, and the total expense of production $15,500; that the estimated total bullion product from the mine after its discovery down to on or about February 1st 1892 was $317,879.78; that beyond all doubt the ore averaged at least $18 per ton in gold; that the mine contained 44,733 tons of gold ore in reserve, of the net value of $805,186, and also 37,333 tons of gold ore in sight, of the net value of $761,094, and that the mines and mining claims had a very large prospective value in addition thereto; that the gold-bearing vein in the mine was a permanent and lasting one, and that the property under energetic management should produce from $30,000 to $40,000 per month net, and keep the development even with the output; together with other statements of fact in regard to the property, each and all of which were false and fraudulent, representing said report to be just, accurate and true, although knowing the same to be false and fraudulent;

That during the course of a mill run of the mine made by the plaintiffs for the purpose of testing the value of the ores contained therein, the defendant falsely and fraudulently, and with intent thereby to deceive and defraud them, placed and caused to be placed, in and among the ores to be reduced in the mill run, exceptionally rich specimens of ore that were not part of the ordinary production of the mine, and placed and caused to be placed therein large quantities of exceptionally rich ore that had been mined on the premises, but reserved by him over a long period of time, and which contained gold far in excess of the average amount carried by the ore produced from the mine, and caused false and fraudulent representations to be made as to the amount of ore run through the mill at that time, understating the same, with the intent and result, that a much larger production of gold might seem to be produced from the ore reduced than was just and true; and,

That the defendant falsely and fraudulently, and with the intent thereby to deceive and defraud the plaintiffs, represented to them that certain portions of the mine, from which all the valuable ore had been extracted, were still solid and untouched, and blocked up the entrance to such excavations with timber, which he falsely and fraudulently stated was placed in the mine for the purpose of support, and that it was dangerous to remove the same, with the intent and result of thereby preventing the plaintiffs and their representatives from investigating the condition of the mine; and falsely and fraudulently, and with the intent to thereby deceive and defraud the plaintiffs, changed certain bullion returns as to past production, misstating the quantities of ore producing the bullion so as to

show a much larger and richer production of gold from the ore mined than had in fact been made.

It was alleged that all these representations were made and all these acts were done and caused to be done in the full knowledge that they were false and fraudulent and calculated to deceive and defraud, and with the intent and result that the same should be communicated to the plaintiffs, and thereby deceive and defraud them, inducing the belief that the land, mine and mining claim were worth at least the sum of $1,000,000.

The complaint further alleged that if said representations, reports and mill run had been true and accurate, the property would have been reasonably worth $1,000,000, whereas, as the defendants knew at the time, it was worth practically little or nothing; that, relying upon the representations, reports and mill run mentioned, the plaintiffs purchased the property for the sum of $400,000, paying $150,000 in cash, and executing notes and mortgages upon the property to the amount of $225,000, as part of the price; and had paid, laid out and expended large sums of money on the property in the attempt to develop it.

The plaintiffs therefore claimed that they had suffered damage to the amount of $1,000,000, for which they prayed judgment.

The defendant denied each and every allegation of the complaint. He specifically denied that he ever made any representations to the plaintiffs, directly or indirectly, through Griffith or at all, in reference to the property, or that he ever sold it to or received any money from them on account of it.

It may be here stated that there was evidence in the case tending to show that the negotiations for the property were between the plaintiffs and Griffith, and it was a question whether Griffith was to be deemed in any sense an agent of Sigafus in the sale of the property to the plaintiffs. It was also a question whether the defendant did or caused to be done anything that was calculated to mislead and deceive, or did in fact mislead and deceive the plaintiffs in their preliminary examination of the property by an expert, whereby they were induced to think that it had a value which, within the defendant's knowledge, it did not really possess.

There was a verdict in favor of the plaintiffs for $330,275. A motion for new trial having been denied, judgment was entered for the amount of the verdict. The case was carried to the Circuit Court of Appeals, and that court, while sustaining the rulings of the trial court on questions involving the admission and exclusion of evidence, left certain points undisposed of in order that the question raised by them could be certified to this court. The Circuit Court of Appeals—Judge Lacombe delivering the opinion of the court—among other things said: "The only remaining assignments of error are the twenty-sixth, to so much of the charge as instructed the jury that the 'measure of damages is the difference

between the value of the property as it proved to be and as it would have been as represented," and the twenty-eighth, to the refusal to charge substantially that the measure of damages is the money plaintiffs had paid out for the mine with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it. In view of the recent opinion in *Smith* v. *Bolles*, 132 *U. S.* 125, this court desires the instruction of the Supreme Court for its proper decision of the question arising upon these two assignments of error. A certificate in the form required by the act of March 3d 1891 has therefore been prepared and will be forwarded to the Supreme Court. The fact that instructions are thus desired as to a single question out of the many arising upon this writ of error affords no sufficient ground for withholding the decision of this court as to the other questions in the cause. *Compton* v. *Railroad Co.* 31 *U. S. App.* 486. This opinion is therefore placed on file, and when instructions are received as to the questions certified the cause will be finally disposed of." 51 *U.S. App.* 673; 84 *Fed. Rep.* 430, 439.

This case was heard here upon the question certified from the Circuit Court of Appeals. But after it was argued and submitted, this court directed the entire record to be sent up, and the case is now before us upon writ of certiorari.

1. At the trial in the Circuit Court, the evidence in behalf of the plaintiffs being closed, the defendant moved to dismiss the complaint upon several grounds, one of which was that the contract in relation to the property in question was alone with Griffith. That motion was denied, and the defendant then introduced evidence in his behalf. The Circuit Court of Appeals properly held that as the defendant did not rest upon the denial of his motion to dismiss, but introduced evidence, he could not assign the refusal to dismiss as error. *Columbia R. R. Co.* v. *Hawthorne*, 144 *U. S.* 202; *Union Pacific Ry. Co.* v. *Daniels*, 152 *U. S.* 685; *Runkle* v. *Burnham*, 153 *U. S.* 216.

2. After calling attention to the material issues of fact, and after stating the general propositions of law upon which, when applied to the evidence, the rights of the parties depended, the Circuit Court charged the jury:

"The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented. You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the extent that the plaintiffs have been injured by one of several misrepresentations, they are entitled to recover for that; that is, if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs."

To the giving of this instruction the defendant took an exception.

The defendant asked that the jury be instructed as follows:

"If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine when plaintiffs bought it must be applied in reducing and extinguishing the plaintiffs' loss."

The Circuit Court refused to give this instruction, and to such refusal the defendant took an exception.

The question presented by the charge to the jury touching the measure of damages has been heretofore determined by this court in *Smith* v. *Bolles*, 132 *U. S.* 125, 129. That was an action to recover damages for alleged fraudulent representations in the sale of four thousand shares of mining stock at the price of $1.50 per share, that is, $6,000. The petition alleged that the stock was wholly worthless, but would have been worth at least ten dollars per share, that is, $40,000, if it had been as represented by defendant. The prayer was for $40,000 as damages arising from the sale of shares of stock for which only $6,000 was paid. The trial court instructed the jury that "the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence."

This court held that instruction to be erroneous. Speaking by the Chief Justice we said: "The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation.

The reasonable market value, if the property had been as represented, affords, therefore, no proper element of recovery."

These principles have been applied in numerous cases in the Federal courts. *Atwater* v. *Whiteman*, 41 *Fed. Rep.* 427, 428; *Glaspell* v. *Northern Pacific Railway Co.*, 43 *Fed. Rep.* 900, 904; *The Normannia*, 62 *Fed. Rep.* 469, 481; *Wilson* v. *New United States Cattle Ranch Co.*, 73 *Fed. Rep.* 994, 997; *Rockefeller* v. *Merritt*, 40 *U. S. App.* 666, 674. In the case last cited Judge Sanborn said: "The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and is limited to compensation."

Substantially the rule announced in *Smith* v. *Bolles* has been applied in the following cases in State courts: *Reynolds* v. *Franklin*, 44 *Minn.* 30, 31; *Redding* v. *Godwin*, *Id.* 355, 358; *Wallace* v. *Hallowell*, 56 *Minn.* 501, 507; *Woolenslagle* v. *Runals*, 76 *Mich.* 545, 553; *Buschmann & Cook* v. *Codd*, 52 *Md.* 202, 209; *Greenwood* v. *Pierce*, 58 *Tex.* 130, 133; *Howes* v. *Axtell*, 74 *Iowa*, 400, 402; *High* v. *Berret*, 148 *Pa. St.* 263. In the last named case—which was an action to recover damages for deceit in the sale of shares of stock in a mining corporation—the Supreme Court of Pennsylvania said: "The remaining question is, what is the proper measure of the plaintiff's damages? His damages should equal the loss which the deceit which the jury have found was practiced upon him inflicted. The loss, in the transaction before us, is the difference between the real value of the stock at the time of the sale and the fictitious value at which the buyer was induced to purchase. His actual loss does not include the extravagant dreams which prove illusory, but the money he has parted with without receiving an equivalent therefor."

The same principle was recognized by the English Court of Appeal in the leading case of *Peek* v. *Derry*, 37 *Ch. Div.* 541, 591, 594. That was an action to recover damages for the fraudulent representations of the defendant whereby the plaintiff was induced to take shares in a certain company at the price of £4,000. The question of the proper measure of damages in such a case was directly presented and considered. Lord Justice Cotton said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4,000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4,000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendant was having the

shares, instead of having in his pocket the £4,000. The loss therefore must be the difference between his £4,000 and the then value of the shares." Sir James Hannen, referring to the question of damages, said in the same case: "The question is, how much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4,000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got." Lord Justice Lopes said: "The question in this case is, what is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true measure of his damage? In my opinion it is the difference between the £4,000 he paid and the real value of the shares after they were allotted." The case having been carried to the House of Lords, the judgment therein was reversed, but not upon grounds at all affecting the ruling made in the Court of Appeal upon the question of the proper measure of damages. *Derry* v. *Peek*, 14 *App.* 337.

There are adjudged cases holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase, and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued if the seller's representations concerning it had been true. So, in the present case, (taking it to be as set out in the plaintiff's pleadings,) although the defendant agreed to take, and the plaintiff agreed to pay, $400,000 for the property in question, the latter—according to some cases, interpreting literally the words used in them—could retain the property and recover by way of damages the difference between its real value at the date of purchase and the sum of $1,000,000, which the plaintiff alleged it would have been worth at that time if the representations of the defendant concerning it had been true. We held in *Smith* v. *Bolles* that such was not the proper measure of damages, that case being like this in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith* v. *Bolles*. Upon the assumption that the property was not worth what the plaintiffs agreed to give for it, they were entitled to have—if the evidence sustained the allegation of false and fraudulent representations upon which they were entitled to rely and upon which they in fact relied—a verdict and judgment representing in damages the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and, in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering "the expected fruits of an unrealized speculation." If the plaintiffs were inveigled by the fraud of the defend-

ant into purchasing this mining property, a judgment of the character just indicated would make them whole on account of the loss they sustained. More they are not entitled to have at the hands of the law in this action.

Many other questions have been discussed by counsel, but as they may not arise upon another trial, we deem it unnecessary now to consider them.

It results that the trial court erred upon the question of the measure of damages applicable to the case. Its judgment must be reversed with directions for a new trial and for further proceedings consistent with the principles of this opinion.

It is so ordered.

Mr. Justice BROWN and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.